11-1-1991

# The Pending Gauntlet to Free Exercise: Mandating that Clergy Report Child Abuse

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# THE PENDING GAUNTLET TO FREE EXERCISE: MANDATING THAT CLERGY REPORT CHILD ABUSE

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*There is an appointed time for everything, and a time for every affair under the heavens. . . . a time to be silent, and a time to speak.*[1]

## I. INTRODUCTION

David Motherwell, E. Scott Hartley and Louis Mensonides, three religious counselors at Community Chapel—a small evangelical church in Seattle, Washington—were convicted for criminal failure to report suspected child abuse.[2] Reverend Ernest Knoche, a Lutheran clergyman in Pennsylvania, was subpoenaed to testify before a federal grand jury concerning subjects discussed during family counseling sessions.[3] Father Kohlmann, a Catholic priest, returned stolen goods to the rightful

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1. *Ecclesiastes* 3:1, 7 (New Am. Bible).

2. *See* State v. Motherwell, 788 P.2d 1066, 1067 (Wash. 1990). The Supreme Court of Washington, en banc, affirmed the convictions of Motherwell and Mensonides, but reversed Hartley's conviction. The court reversed because Hartley was the only one of the three who was an ordained minister, and the Washington reporting statute exempted clergy by omission when they were counseling as clergy. *Id.* at 1069. The statute stated in pertinent part: "When any practitioner, professional school personnel, registered or licensed nurse, social worker, psychologist, pharmacist, or employee of the department [of social and health services] has reasonable cause to believe that a child . . . has suffered abuse or neglect, he shall report such incident . . . ." *Id.* at 1068. The court noted that the statute defined "clergy" as "any regularly licensed or ordained minister, priest or rabbi of any church or religious denomination, whether acting in an individual capacity or as an employee or agent of any public or private organization or institution." *Id.* at 1069.

*See* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1605 (1990). Justice Scalia, writing for the majority, opined that accommodations for free exercise should be left to the political process. *Id.* at 1606. The Washington statute's omission of clergy is such a political accommodation. *See generally Review of Supreme Court's Term*, 59 U.S.L.W. 3081 (Aug. 14, 1990) (emphasizing Supreme Court's drift toward political accommodation of religion).

3. *In re* Grand Jury Investigation, 918 F.2d 374, 376 (3d Cir. 1990).

owner after a parishioner confessed that he had knowingly received the stolen property.[4] Kohlmann was also subpoenaed by a grand jury to identify those responsible for the crime.[5]

These three cases share similar factual contexts: they all involve attempts by the state to compel individuals functioning in a religious capacity to reveal confidential statements made during religious practices. In each case, the involved cleric refused to do so based on the First Amendment's guarantee of free exercise of religion.[6] In all three instances, each court allowed the person acting as clergy to maintain the confidentiality of such communications.[7] The courts, however, offered different reasons to support their conclusions.

Minister Hartley's conviction was reversed on appeal because the court found that the state legislature intended to exempt clergy from its mandatory reporting statute.[8] Pastor Knoche found protection from the federal grand jury subpoena within the clergy-communicant privilege set forth in the Federal Rules of Evidence.[9] Lastly, the court maintained the confidentiality of Father Kohlmann's penitent based on his First Amendment right to free exercise of religion.[10]

The factual context is important in each of these challenges to confidential communications that are made during religious practice. Under a state statute mandating that clergy report instances of child abuse, an

4. People v. Philips, N.Y. Ct. Gen. Sess. (1813). The *Philips* case was never officially published, but a participating attorney reported on the case in WILLIAM SAMPSON, THE CATHOLIC QUESTION IN AMERICA (1813 reprinted in 1974). *See also* Michael J. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1410-11 (1990).

5. SAMPSON, *supra* note 4, at 53; McConnell, *supra* note 4, at 1411.

6. *See* U.S. CONST. amend. I. The First Amendment states in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.*; *see Grand Jury Investigation*, 918 F.2d at 378; *Motherwell*, 788 P.2d at 1073-74; SAMPSON, *supra* note 4, at 53.

7. *Grand Jury Investigation*, 918 F.2d at 388; *Motherwell*, 788 P.2d at 1076; SAMPSON, *supra* note 4, at 114.

8. *Motherwell*, 788 P.2d at 1076. The court noted that prior to 1975, the Washington reporting statute specifically included clergy within the reporting mandate. *Id.* at 1069. The court then pointed out that in 1975, the state legislature deleted the reference to clergy. *Id.* at 1069. The Washington Supreme Court found in this deletion an implied exemption of clergy and held that "members of the clergy counseling their parishioners in the religious context" were not subject to the reporting mandate. *Id.* at 1069. Minister Hartley's co-defendants were not ordained at the time they learned of the suspected child abuse and thus did not fall within the clergy exemption. *Id.*

9. FED. R. EVID. 501; *see Grand Jury Investigation*, 918 F.2d at 379-83 (interpreting Rule 501 to include clergy-communicant privilege).

10. *See* SAMPSON, *supra* note 4, at 114. The New York court ruled that the priest was constitutionally exempt from testifying before the grand jury. *Id.* The court found that the state's interest did not outweigh the burden on religious practice. *Id.*

exception given to clergy for disclosures made during religious acts will exempt the cleric who meets the factual requirements of that exception. Clerics will also be exempt to the extent that Congress provides for a clergy-communicant privilege under the Federal Rules of Evidence.[11] Similar to the various state evidentiary privileges,[12] the Federal Rules of Evidence would exempt clergy if four fundamental prerequisites are met.[13] However, when a child abuse reporting statute fails to exempt clerics from reporting instances of child abuse, or specifically names clerics among those who are required to report, the cleric faces a dilemma in the conflict between the tenets of his or her religion and the legal duty under the statute.[14] An increasing number of states have created this dilemma by seeking to stem the tide of child abuse cases with mandatory reporting statutes that include clergy.[15]

It is within this third factual context that the gauntlet lies before the Free Exercise Clause of the First Amendment:[16] may the cleric look to

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11. FED. R. EVID. 501.

12. See *infra* notes 147-211 and accompanying text for a discussion of the clergy-communicant evidentiary privilege in general and the various state evidentiary privileges.

13. 8 JOHN H. WIGMORE, EVIDENCE § 2285, at 527 (McNaughton rev. ed. 1961). Dean Wigmore states:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

*Id. But see Grand Jury Investigation*, 918 F.2d at 379 n.6 (stating that in federal civil cases deference must be given to any applicable state law governing privilege).

14. U.S. CONST. amend. I. See *supra* note 6 for the text of the First Amendment Free Exercise Clause.

15. Although this Article will briefly discuss other professionals who are required to report child abuse, it will focus on statutes that mandate reporting by clergy.

States include clergy within the purview of mandatory reporting statutes in different ways. A state may specifically include clergy within the mandate to report suspected cases of child abuse, *see, e.g.*, CONN. GEN. STAT. ANN. § 17a-101(b) (West Supp. 1991), or may require reports from "all persons" and not recognize a clergy privilege, *see, e.g.*, IND. CODE ANN. § 31-6-11-3 (Burns 1987 & Supp. 1991). The clergy-communicant privilege may either be expressly abrogated, *see, e.g.*, ARIZ. REV. STAT. ANN. § 13-3620(G) (1989 & Supp. 1990) (abrogates clergy-communicant privilege as grounds to discharge duty to report), or impliedly abrogated by revocation of all or some combination of privileges, *see, e.g.*, NEV. REV. STAT. ANN. § 432B.250 (Michie 1986) (any person required to report may not invoke any privilege as grounds for failure to report). See *infra* notes 105-46 and accompanying text for a discussion of the various approaches taken by state legislatures.

16. U.S. CONST. amend. I. See *supra* note 6 for the text of the First Amendment Free Exercise Clause.

the First Amendment to protect confidences transmitted during religious rituals? Can the Free Exercise Clause be weakened to allow enforcement of mandatory child abuse reporting statutes that conflict with the right to objective exercise of religion? Because the United States Supreme Court has rejected the compelling state interest test which allowed exemptions for religious conduct from generally applicable statutes,[17] these statutes must now confront religion directly. The specific question of the constitutionality of mandatory reporting statutes sets the stage for a conflict between a traditional state concern—the protection of children from abuse[18]—and religious practices, such as the penitential rite of the Roman Catholic Church.[19]

This Article analyzes the conflict between statutory child abuse reporting requirements for clergy[20] and the clergy-communicant privilege for confidential communications made within specific religious practices. The constitutional conflict arises between the state's interest in the protection of children by requiring that suspected cases of abuse be reported and the clergy's interest in the free exercise of their religious tenets by maintaining confidentiality.[21] This analysis recognizes that state legislators have broadened reporting requirements to include more and more classes of people in an effort to arrest the tremendous increase in child abuse in the past decade.[22] As a result, the shield of privileged communi-

17. *See* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1604-06 (1990). See *infra* notes 65-77 for a discussion of the compelling state interest test.

18. The state's interest in preventing child abuse entails both the protection of children from their abusers and the prevention of abused children from becoming abusers themselves. Researchers have reported a pattern of future abuse committed by those who have been abused as children. *See* Raymond C. O'Brien, *Pedophilia: The Legal Predicament of the Clergy*, 4 J. CONTEMP. HEALTH L. & POL'Y 91, 114 (1988). *But cf.* James M. Peters et al., *Why Prosecute Child Abuse?*, 34 S.D. L. REV. 649, 654-55 (1989) (discussing research findings that refute conclusion that abusers were themselves victims of abuse).

19. This conflict affects more than the Roman Catholic religion. In fact, the challenge to the free exercise right is greatest for the "confessional" practices of minority religions which are not as well-documented or historically rooted as the Roman Catholic Seal of Confession.

20. Each state statute requiring reports of child abuse specifies those who fall within the mandate, *see, e.g.*, IDAHO CODE § 16-1619(a) (Supp. 1991) (including physicians, school teachers and social workers as classes required to report), and those who are exempted from the requirement, *see, e.g.*, MD. FAM. LAW CODE ANN. § 5-705(a)(3)(Supp. 1990) (clergy not required to provide notice of child abuse where bound by canon law, church doctrine or practice to maintain confidentiality). No state has a singular statute requiring only clergy to report child abuse. See *infra* notes 105-46 for a discussion of child abuse reporting statutes.

21. See *infra* notes 212-319 and accompanying text for a discussion of the constitutional conflict.

22. More than 2.4 million cases of child abuse were reported last year. Andrea Jurgrau, *How to Spot Child Abuse*, RN, Oct. 1990, at 23. This is equivalent to more than 30 children per 1000. Unfortunately, an even greater number of cases have gone unreported. *See id.* Of the cases that are reported, relatively few are prosecuted because often "the report does not

the way in which the Court has interpreted other constitutional provisions to afford rights to minorities not protected by the political process[27] should serve as a guide for the Court when it addresses the conflict between free exercise and child abuse reporting statutes. The First Amendment should protect those farthest from the political process in their religious practices in the same fashion that it protects anti-majoritarian political views.

Finally, this Article proposes that the interests of the state served by the clergy-communicant privilege outweigh the interest in protecting children through mandated reporting. In an effort to evoke protection of these confidential communications through the political process, this Article examines the constructive role of clergy-communicant confidentiality in the prevention of child abuse. What appears to be a conflict between mandatory reporting statutes and the assertion of confidentiality is actually two different means to the same end of protecting children. No legal analysis concerning the possibility of litigation over the enforceability of child abuse reporting statutes should ever lose sight of the fact that protecting children from abuse is paramount to both the clergy and the state.

## II. BACKGROUND

### *A. The Factual Context*

The three cases noted above[28] represent factual paradigms for the analysis of the legal issues raised by mandatory reporting statutes. *State v. Motherwell*[29] involved the prosecution of three religious counselors for violation of a child abuse reporting statute.[30] David Motherwell counseled members of his church on a variety of topics such as marriage, family, relationships and finances, but his primary concern was "developing . . . [the counselee's] personal relationship with Jesus Christ."[31] In

27. *See, e.g., Craig*, 110 S. Ct. 3157; *Osborne*, 110 S. Ct. 1691; *Bouknight*, 110 S. Ct. 900; Palmore v. Sidotti, 466 U.S. 429 (1983) (Equal Protection Clause outweighs personal biases against interracial remarriage in child custody decisions); Loving v. Virginia, 388 U.S. 1 (1967) (state's police power to regulate interracial marriages must yield to Equal Protection Clause); McLaughlin v. Florida, 379 U.S. 184 (1964) (state's interest in forbidding interracial cohabitation must yield to Fourteenth Amendment); Brown v. Board of Educ., 349 U.S. 294 (1955) (right to public education must never yield to administrative implementation difficulties); Buchanan v. Warley, 245 U.S. 60 (1917) (public policy must yield to principle of free alienation of land without respect to race).

28. *See supra* notes 2-10 and accompanying text.

29. 788 P.2d 1066 (Wash. 1990).

30. *Id.* at 1067. See *infra* notes 206-09 and accompanying text for a discussion of clergy qualifications to counsel in child abuse cases.

31. *Motherwell*, 788 P.2d at 1067.

cations between clergy and communicant, attorney and client, doctor and patient, and counselor and client, has become more narrowly defined. The legislative reevaluation of the clergy-communicant privilege involves a greater constitutional issue: whether the religious liberty interest protected by the Free Exercise Clause can withstand one of the most egregious situations within society, the abuse of children.

This Article evaluates the First Amendment protection of freedom of religion, specifically the right to maintain privileged communications as an exercise of religious practice, in light of the United States Supreme Court's treatment of other rights guaranteed by the Constitution.[23] For example, if a priest is to assert the privilege to maintain the confidentiality of information received within the Sacrament of Penance,[24] the interest in doing so must equal or outweigh the state's interest in protecting children. A number of United States Supreme Court decisions have balanced similar interests in a variety of cases.[25] Thus, even if the Court has abandoned the balancing involved in the compelling state interest test,[26]

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allege activity that violates a criminal law or does not identify a perpetrator .... Most often, however, a reported case is not prosecuted because, in the prosecutor's judgment, there is not enough evidence to meet the criminal standard of proof beyond a reasonable doubt." Peters et al., *supra* note 18, at 656-57.

There has been an evolution of the type of cases that have been reported in the past decade and a wider range of child abuse victims has been identified. Whereas in the past 10 years the so-called "classic" cases of multiple fractures, severely underweight children, and traumatic sexual assault constituted the majority of cases, the trend in recent years has been towards cases of less severe injuries being reported, presumably as a result of misinterpretations by caretakers or overconcern about sexual abuse. *See* William N. Marshall, Jr., et al., *New Child Abuse Spectrum in an Era of Increased Awareness*, 142 AM. J. DISEASES CHILDREN 664, 666 (1988) (demonstrating that as recognition and awareness of child abuse changes, so do kinds of patients being seen by physicians).

23. *Smith* concerned itself only with generally applicable laws as they related to "religiously motivated action." *Smith*, 110 S. Ct. at 1601. In those hybrid situations where the free exercise claim is "in conjunction with other constitutional protections, such as freedom of speech and of the press," a compelling state interest test is appropriate. *Id.* See *infra* notes 72-90 and accompanying text for a discussion of the *Smith* decision.

24. The Sacrament of Penance is a rite of the Roman Catholic Church. Pursuant to the Code of Canon Law the penitent sincerely confesses his or her sins to a priest, and resolves to reform and to obtain God's forgiveness. Through this rite, the penitent is reconciled with the church. 1983 CODE c.959.

25. *See, e.g.*, Maryland v. Craig, 110 S. Ct. 3157 (1990) (Confrontation Clause may be outweighed by interest in protecting children); Osborne v. Ohio, 110 S. Ct. 1691 (1990) (protection of child may outweigh First Amendment interest involving right to possess and view pornography); Baltimore City Dep't of Social Servs. v. Bouknight, 110 S. Ct. 900 (1990) (Fifth Amendment privilege against self-incrimination may give way to state interest in protecting children). See *infra* notes 270-303 and accompanying text for a discussion of the Supreme Court's reasoning in these cases.

26. *See Smith*, 110 S. Ct. at 1602-06. See *infra* notes 65-77 and accompanying text for a discussion of the compelling state interest test.

the course of his counseling, a woman told him that her husband was sexually abusing their eight-year-old daughter and was violent with the rest of the family.[32] E. Scott Hartley, the only ordained minister among the three religious counselors, was told by another woman that her husband had sexually molested their daughter.[33] Hartley attempted to reconcile the family by discussing the problem with both the husband and the daughter.[34] Likewise, a woman told Louis Mensonides that her husband had beaten their two sons, who were ages four and seven at the time.[35] Mensonides held counseling sessions with the older of the two boys.[36] None of the three counselors reported these incidents to the authorities as required under the Washington statute, and all three were convicted of failing to comply with the reporting requirement.[37] The appellate court overturned Hartley's conviction based on his status as an ordained minister.[38] The court implied an exemption from the Washington reporting statute for clergy when acting in the role of religious counselor.[39] The other convictions were upheld.[40]

*In re Grand Jury Investigation*[41] involved a Lutheran clergyman called before a federal grand jury to testify about subjects discussed during a family counseling session.[42] Pastor Knoche stated that family counseling "constituted a typical and important part of his ministry."[43] The district judge accepted the pastor's argument and concluded that "compelling the pastor to testify would break down church-state divisions, infringe upon the right to participate in religious activities, invade a 'sacrosanct' area, and, through depriving families of confidential religious counseling, endanger them."[44]

On appeal, the government asked the Third Circuit Court of Ap-

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32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 1067-68.
38. *Id.*
39. *Id.*
40. *Id.*
41. 918 F.2d 374 (3d Cir. 1990).
42. *Id.* at 377-78. See *infra* notes 206-09 for a discussion of clergy qualifications to counsel in child abuse cases.
43. *Grand Jury Investigation*, 918 F.2d at 378. The district court characterized the pastor's ministry as founded upon the Judeo-Christian notion of redemption and forgiveness through counseling and prayer. Furthermore, persons spiritually counseled expect that their communications will be kept in strict confidence. *Id.*
44. *Id.*

peals to compel the clergyman's testimony.[45] Relying on the confidential communications privilege in the Federal Rules of Evidence,[46] the court decided that the "privilege protects communications to a member of the clergy, in his or her spiritual capacity, by persons who seek spiritual counseling and who reasonably expect that their words will be kept in confidence."[47] The court generously affirmed the privilege, recognizing that "virtually every state has recognized some form [thereof],"[48] it is available in the context of multiple parties, and is "socially desirable."[49] The court remanded the case for further proceedings, but left no doubt that if the communications fit within the confines of the privilege, the minister could not be compelled to reveal what he had learned during the counseling sessions.[50]

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45. *Id.* at 376.

46. FED. R. EVID. 501.

47. *Grand Jury Investigation*, 918 F.2d at 377. Under the Federal Rules of Evidence, Rule 501 is applicable to state grand jury proceedings and is an evolution of privileges in federal criminal cases. *Id.* at 399. Nonetheless, "Rule 501, as it applies to federal civil cases, incorporates the doctrine of Erie R.R. Co. v. Thompkins, 304 U.S. 64 (1938), and requires deference to any applicable state law governing privileges." *Id.* at 379 n.6 (parallel citations omitted). Thus, the applicability of state law in civil cases is determinative. See *infra* notes 147-211 and accompanying text for further discussion of the civil context of privilege. *See also* O'Brien, *supra* note 18, at 138-50.

48. *Grand Jury Investigation*, 918 F.2d at 381. See *infra* note 147 for citations to clergy-communicant privilege statutes.

49. *Grand Jury Investigation*, 918 F.2d at 383. See *infra* notes 206-11 stating the argument that confessional opportunities are socially desirable.

50. *Grand Jury Investigation*, 918 F.2d at 384-85. The Third Circuit Court of Appeals was also willing to allow inquiry into the "pastoral counseling practices of the relevant synod of the Lutheran Church." *Id.* This is "both a necessary and a constitutionally inoffensive threshold step in determining whether a privilege interdenominational in nature applies in light of the facts and circumstances of a particular case." *Id.* at 387 n.21. Such an inquiry is pertinent to a free exercise claim, for such a claim is conditioned upon beliefs rooted in religion; secular beliefs, however sincere and conscientious, do not suffice. *See, e.g.*, Africa v. Pennsylvania, 662 F.2d 1025 (3d Cir. 1981) (prisoner could not claim special diet privilege since claim was not based on religious beliefs), *cert. denied*, 456 U.S. 908 (1982); United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968) (claim to justify marijuana use as free exercise right not based on religious beliefs). But see Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1604 (1990), where Justice Scalia wrote for the majority: "[C]ourts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Id.* Indeed, one of the rationales for the Court's rejection of the use of the compelling interest test in *Smith* was because "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice." *Id.* at 1606 n.5. Even though Justice O'Connor wrote a concurring opinion in *Smith* in favor of use of the compelling interest test, she agreed with the majority's use of Hernandez v. Commissioner, 490 U.S. 680 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith."). She did, however, allow for courts to examine sincerely held religious beliefs. *Smith*, 110 S. Ct. at 1603 (O'Connor, J., concurring).

Finally, in the New York case of *People v. Philips*,[51] Daniel Philips entered the confessional and confessed to Father Kohlmann, his parish priest, that he had knowingly received stolen goods.[52] The priest insisted that the penitent return the stolen goods, and the man brought the items to the priest under the confidentiality of the Seal of Confession.[53] It was when the priest returned the goods to the rightful owner that Father Kohlmann was subpoenaed to appear before the grand jury to identify those responsible for the crime.[54] The priest refused to identify them, claiming religious privilege.[55]

The court addressed the issue of whether the Free Exercise Clause required an exemption from the legal duty to testify[56] and ruled that the

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51. *See* SAMPSON, *supra* note 4, at 112-14.

52. McConnell, *supra* note 4, at 1410-11; *see* SAMPSON, *supra* note 4, at 5-12.

53. SAMPSON, *supra* note 4, at 5-12. "The sacramental seal is the strict and inviolable obligation of keeping secret all matters that have been related to the confessor for the purpose of obtaining absolution, the revelation of which would render the sacrament odious and onerous." CODE OF CANON LAW: A TEXT AND COMMENTARY 927 (James A. Coriden et al. eds., 1985) [hereinafter CODE OF CANON LAW].

54. SAMPSON, *supra* note 4, at 5.

55. *Id.* at 10-12. Father Kohlmann testified:

> [I]f called upon to testify in quality of a minister of a sacrament, in which my God himself has enjoined on me a perpetual and inviolable secrecy, I must declare to this honorable Court, that I cannot, I must not answer any question that has a bearing upon the restitution in question; and that it would be my duty to prefer instantaneous death or any temporal misfortune, rather than disclose the name of the penitent in question. For, were I to act otherwise, I should become a traitor to my church, to my sacred ministry and to my God. *In fine*, I should render myself guilty of eternal damnation.

McConnell, *supra* note 4, at 1411. The case of People v. Philips, N.Y. Ct. Gen. Sess. (1813), marked the first recognition of the clergy-communicant privilege in the United States. Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 737 (1987).

56. SAMPSON, *supra* note 4, at 51; *see also* McConnell, *supra* note 4, at 1411. Professor McConnell framed the issue presented to the court in *Philips*:

> [D]oes the freedom of religious exercise guaranteed by the constitutions of the states and the United States require the government, in the absence of a sufficiently compelling need, to grant exemptions from legal duties that conflict with religious obligations? Or does this freedom guarantee only that religious believers will be governed by equal laws, without discrimination or preference?

*Id.* In order to determine whether the Free Exercise Clause requires an exemption from a generally applicable law, the United States Supreme Court has applied the compelling state interest test. *See Smith*, 110 S. Ct. at 1610 (O'Connor, J., concurring). Thus, the compelling state interest test and the free exercise exemptions doctrine become one when the doctrine is explained:

> If the plaintiff can show that a law or governmental practice inhibits the exercise of his religious beliefs, the burden shifts to the government to demonstrate that the law or practice is necessary to the accomplishment of some important (or "compelling") secular objective and that it is the least restrictive means of achieving that objective. If the plaintiff meets his burden and the government does not, the plaintiff is entitled to exemption from the law or practice at issue.

priest was constitutionally exempt from testifying.[57] The decision was based on a balancing of the government's interest in access to evidence in the adversarial process against religious obligations.[58] The court found that "[a]lthough the government had a legitimate need and the authority to compel testimony, that need did not outweigh the interference with the relationship between priests and penitents in the Roman Catholic Church."[59]

### *B. The Legal Context*

Free exercise doctrine has a convoluted history.[60] The first recorded American case to recognize the free exercise exemption was *People v. Philips*,[61] decided by a New York court in 1813. *Philips* held that the Constitution required that a Catholic priest be exempt from testifying before the grand jury regarding confessional communications.[62] The court found that religious confession was deeply rooted in American practices both before and after independence.[63] Nonetheless, a series of United States Supreme Court cases over the next 150 years upheld laws that precluded religious practices.[64]

#### 1. Development of free exercise jurisprudence

In 1963 modern free exercise doctrine began to emerge with the

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McConnell, *supra* note 4, at 1416-17 (citation omitted). See *infra* notes 65-77 and accompanying text for a discussion of the compelling state interest test.

57. McConnell, *supra* note 4, at 1411.

58. *Id.* at 1411-12.

59. *Id.*

60. *Id.* at 1410-13, 1511-12.

61. SAMPSON, *supra* note 4, at 5-114; *see also* McConnell, *supra* note 4, at 1410-12 (Catholic priest called upon to testify about identity of parishioner who confessed to receiving stolen goods).

62. SAMPSON, *supra* note 4, at 108-44. "It is essential to the free exercise of religion, that its ordinances should be administered—that its ceremonies as well as its essentials should be protected. The sacraments of a religion are its most important elements." *Id.* at 111.

63. McConnell, *supra* note 4, at 1412.

64. *Id.* (citing Braunfeld v. Brown, 366 U.S. 599 (1961) (upholding Sunday closing laws against Orthodox Jews); Cleveland v. United States, 329 U.S. 14 (1946) (finding Mann Act violation where members of polygamous religious sect transported wives across state lines); Prince v. Massachusetts, 321 U.S. 158 (1944) (enforcing child labor laws against child distributing religious literature); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934) (upholding suspension of students refusing to participate in ROTC because of religious convictions against war); The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (upholding statute revoking charter of Mormon church and confiscating property); Davis v. Beason, 133 U.S. 333 (1890) (upholding enforcement of anti-polygamy laws against Mormons); Reynolds v. United States, 98 U.S. 145 (1878) (upholding enforcement of anti-polygamy laws against Mormons)).

Supreme Court's decision in *Sherbert v. Verner*.[65] In *Sherbert*, the Court held that facially neutral laws burdening religious practices require review under a strict scrutiny standard.[66] A free exercise claimant had to establish that his or her sincerely held religious belief conflicted with a law or government regulation.[67] The burden then would shift to the state, which had to demonstrate that the law or regulation at issue served a compelling state interest and implemented the least restrictive means to achieve that end.[68] The Supreme Court expanded the *Sherbert* doctrine and applied the compelling state interest test to a generally applicable criminal law in *Wisconsin v. Yoder*.[69] During the next twenty-seven years, the Court's First Amendment jurisprudence sought to accommodate both the express textual mandate of the Constitution[70] and the government's interest in regulating conduct by applying the compelling state interest test.[71]

### 2. Abandonment of the compelling state interest test: *Employment Division, Department of Human Resources v. Smith*

In 1990 the Supreme Court abandoned a significant portion of the history of free exercise doctrine when it rejected the compelling state interest test in *Employment Division, Department of Human Resources v. Smith*.[72] Justice Scalia wrote for the majority denying a free exercise

65. 374 U.S. 398 (1963) (state must modify its unemployment compensation requirement to accommodate needs of those religiously opposed to working on Saturdays); *see also* Kenneth Marin, Employment Division v. Smith: *The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431, 1438-41 (1991); McConnell, *supra* note 4, at 1412.

66. *Sherbert*, 374 U.S. at 403.

67. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-12, at 1242-51 (2d ed. 1988).

68. *See Sherbert*, 374 U.S. at 406 (only compelling state interest may justify infringement of free exercise right); *see also* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987) (applying strict scrutiny test to strike down denial of unemployment benefits to Seventh-Day Adventist fired for refusing to work on sabbath); Thomas v. Review Bd., 450 U.S. 707, 718-20 (1981) (applying strict scrutiny test to strike down denial of unemployment benefits for Jehovah's Witness whose religious beliefs prevented him from making weapons); Wisconsin v. Yoder, 406 U.S. 205, 220-29 (1972) (finding no compelling state interest in imposing mandatory high school education on Amish children).

69. 406 U.S. 205, 218-19 (1972).

70. U.S. CONST. amend. I. See *supra* note 6 for the text of the First Amendment Free Exercise Clause.

71. Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1608 (1990) (O'Connor, J., concurring). See Marin, *supra* note 65, at 1445-51, for a discussion of the decline of free exercise protection prior to the *Smith* decision.

72. 110 S. Ct. 1595, 1602-06 (1990) (compelling interest test inapplicable to free exercise challenges to criminal prohibitions). Justice Scalia attempted to limit the Court's application of the compelling interest test to cases involving challenges to state unemployment compensation rules. *Id.* at 1603. In contrast, Justice O'Connor's concurrence summarized the history

exemption for the Native American Church practice of peyote use.[73] The majority concluded that the compelling state interest test was inapplicable to First Amendment challenges against generally applicable state laws.[74] The Court held that cases where the First Amendment had barred the application of a "neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press."[75] Thus, the Court in *Smith* limited the application of the compelling state interest test to instances where a hybrid claim couples a free exercise challenge with another alleged constitutional violation. In all cases not involving such a "hybrid situation,"[76] the *Smith* decision relegated the accommodation of religious practices to the political process.[77] As a result, *Smith* marks a significant departure from the historical understanding of the purposes of the Free Exercise Clause.

Specifically, the Supreme Court decided that the freedom of religious believers must be governed by equal laws, without discrimination

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of free exercise doctrine and the centrality of the compelling interest test to First Amendment jurisprudence. *See id.* at 1607-13 (O'Connor, J., concurring).

73. *Id.* at 1606.

74. *Id.* at 1603.

75. *Id.* at 1601.

76. *Id.* In his comments on the *Smith* decision, the Reverend Charles Whelan, S.J., stated: "[I]f all you've got is a Free Exercise case, and the law is of general application, then the necessity to show a compelling state interest does not apply." Reverend Charles Whelan, S.J., Address at Proceedings of the Twenty-Sixth National Meeting of Diocesan Attorneys 30 (Apr. 30-May 1, 1990) (transcript available in Office of General Counsel, United States Catholic Conference, Washington, D.C.).

Father Whelan speculates that the Court's shift in *Smith* was suggested in Jimmy Swaggart Ministries v. Board of Equalization, 110 S. Ct. 688 (1990). Whelan, *supra*, at 23-24. In that case, the unanimous Court concluded that a *generally applicable* sales tax does not impose any significant burden on the distribution of religious books nor, therefore, on religious practices or beliefs. *Swaggart Ministries*, 110 S. Ct. at 696-97.

77. *Smith*, 110 S. Ct. at 1606. Admitting that the denial of a free exercise exemption will have an impact upon minority religious practices, Justice Scalia wrote "that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs." *Id.*

Justice O'Connor's concurring opinion supports the application of the free exercise exception and the historical approach. "[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility." *Id.* at 1613 (O'Connor, J., concurring).

On June 24, 1991, the Oregon legislature amended the state's controlled substances statute that criminalizes the manufacture, delivery and possession of peyote. Act approved June 24, 1991, ch. 329, amending OR. REV. STAT. § 475.922 (WL, OR-LEGIS). The amendment establishes an affirmative defense that the peyote is being used or is intended for use in accordance with religious belief or in religious practice. *Id.*

or preference.[78] This approach abolishes the compelling state interest test which allowed for exemptions from legal duties that conflict with religious obligations. Justice Scalia wrote for the majority: "We conclude . . . that the sounder approach . . . is to hold the [compelling state interest] test inapplicable."[79] This holding represents a rejection of the established legal context of the free exercise exemption,[80] which historically had been seen "as a natural and legitimate response to the tension between law and religious conviction."[81]

The *Smith* decision purports to take the Court another step away from "a system in which . . . judges weigh the social importance of all laws against the centrality of all religious beliefs."[82] Yet the judiciary cannot avoid this kind of balancing. Based on an historical analysis of free exercise jurisprudence,[83] the legislative branch has not always protected the inalienable right of free exercise of religion.[84] Thus, under an

78. *See Smith*, 110 S. Ct. at 1603.

79. *Id.*

80. *Id.* at 1607-09 (O'Connor, J., concurring).

81. McConnell, *supra* note 4, at 1466. Professor McConnell captured the essence of the issue raised by the *Smith* decision when he wrote:

> It might be objected that the example of exemptions from religious assessments is inapt, because generally applicable law is itself religious, not secular, and would be unconstitutional under the establishment clause today. . . . [However,] [t]he decisive question . . . is whether the people at the time of the adoption of the first amendment would likely have considered exemptions, whether legislative or judicial, an appropriate remedy when law and conscience conflict. . . .
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> . . . .
>
> . . . [I]t is reasonable to suppose that framers of constitutional free exercise provisions understood that . . . applications . . . would be made by the courts, once courts were entrusted with the responsibility of enforcing the mandates of free exercise.

*Id.* at 1470, 1473.

This conclusion, which justifies the Court's role in balancing the burden on religious practice against the state's interest, was implied in a brief reference to the legal context of free exercise decisions after *Smith* when Professor McConnell wrote: "The historical record casts doubt on [the *Smith*] interpretation of the free exercise clause." *Id.* at 1420. McConnell's conclusion is based on history, and "while the historical evidence is limited and on some points mixed, the record shows that exemptions on account of religious scruple should have been familiar to the framers and ratifiers of the free exercise clause." *Id.* at 1511.

The author notes that the issue of exemptions arose during colonial times over three issues: oath requirements, military conscriptions and religious assessments. *Id.* at 1512.

82. *Smith*, 110 S. Ct. at 1606.

83. Professor McConnell wrote:

> Indeed, the evidence suggests that the theoretical underpinning of the free exercise clause, best reflected in Madison's writings, is that the claims of the "universal sovereign" precede the claims of civil society, both in time and in authority, and that when the people vested power in the government over civil affairs, they necessarily reserved their unalienable right to the free exercise of religion, in accordance with the dictates of conscience.

McConnell, *supra* note 4, at 1512.

84. *See Smith*, 110 S. Ct. at 1613 (O'Connor, J., concurring).

historical analysis of the Free Exercise Clause, accommodations for religious practices cannot be left to the exclusive role of the political process.[85] Insofar as *Smith* eviscerates the historical role of the judiciary to grant exemptions under the Free Exercise Clause, the gauntlet has been tossed before the First Amendment's protection of religious convictions unable to find accommodation within the political process.

The *Smith* decision has already wrought significant changes. For example, the Sixth Circuit in *Vandiver v. Hardin County Board of Education*[86] ruled that a free exercise challenge to a Kentucky regulation was precluded.[87] The court noted the change in the legal context after *Smith* and held the regulation valid.[88] Because the court found no "hybrid situ-

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> [T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish. . . . The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society.

*Id.*

85. The reason is that "[a] religious duty does not cease to be a religious duty merely because the legislature has passed a generally applicable law making compliance difficult or impossible." McConnell, *supra* note 4, at 1512.

Professor McConnell's conclusions are based primarily on James Madison's position requiring judicial exemptions. McConnell also relied on a personal conclusion:

> [For those] who provided the political muscle for religious freedom in America, . . . the freedom to follow religious dogma was one of this nation's foremost blessings, and the willingness of the nation to respect the claims of a higher authority than 'those whose business it was to make laws' was one of the surest signs of its liberality.

*Id.* at 1517.

86. 925 F.2d 927 (6th Cir. 1991).

87. *Id.* at 932. The regulation required that students transferring from a non-accredited secondary school receive credits either by passing an equivalency examination for a particular course, or by successfully performing in a higher level course by achieving an average grade in the course by the twelfth week of school. *Id.* at 929. The student refused to take the equivalency tests because of a sincere belief that the testing requirement was unfair because "the Lord will [not] allow me a bigger burden than I could carry." *Id.* at 931.

88. *Id.* at 932. The court stated:

> We conclude that Kentucky's regulation of public school testing and academic standing is a valid and neutral law of general applicability within the meaning of *Smith*, so that a free exercise challenge is presumably precluded. . . .
>
> . . . .
>
> . . . [Thus,] only if . . . the student's free exercise challenge is joined with other constitutional concerns may his claim survive the free exercise standard of *Smith*.

*Id.* at 932-33.

Interpreting *Smith*, the *Vandiver* court wrote: "[A] criminal statute of general applicability not directed at religious practices was simply not subject to a free exercise challenge." *Id.* at 932. Furthermore, the court agreed with other circuits that have extended *Smith*'s holding to neutral civil statutes. *Id.*

The court concluded that there was "a small crack for free exercise challenges to generally applicable, religion-neutral laws even when such challenges are not joined with an alleged infringement of another constitutional interest." *Id.* The court found that "[if] the state has

ation"[89] in this case, the student was denied a free exercise exemption to the state statute.[90]

### 3. The impact of *Smith* and some unanswered questions

The new legal context for religious freedom continues to take shape as courts decide free exercise challenges in the wake of the *Smith* decision.[91] This reshaping of the doctrine raises several unanswered questions about the future of free exercise jurisprudence. Is there an exemption for religious practices after *Smith*? What if the state's generally applicable statute encompasses a traditional state concern such as health and safety of citizens?[92]

Specifically, what if the state health and safety statute requires that priests who take confessions from penitents must report instances of child abuse, and this mandated reporting encompasses communications within the Seal of Confession?[93] What if this confessional material is protected under a religious code[94] that affirms the seriousness of confi-

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in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* at 927, 933 (quoting Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1603 (1990)). In *Vandiver*, the court found that the state allowed no system of individual exemptions. *Id.* at 934.

89. *Smith*, 110 S. Ct. at 1601-02; *see supra* notes 72-85 and accompanying text.

90. *Vandiver*, 925 F.2d at 933.

91. *See, e.g.*, Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990) (limitation on options of church to raise revenue for expansion of religious charitable activities did not violate Free Exercise Clause), *cert. denied*, 111 S. Ct. 1103 (1991); Montgomery v. County of Clinton, 743 F. Supp. 1253 (W.D. Mich. 1990) (statute mandating autopsies of all violent death victims not violative of Free Exercise Clause).

Note that the issue of free exercise exemption does not encompass those instances when the state legislature or Congress has granted an exemption. In Peyote Way Church of God v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991), the Fifth Circuit held that federal and state regulations exempting members of the Native American Church from prosecution for religious use of peyote, but not members of other religious groups who use peyote as a sacrament, are constitutional. *Id.* at 1220. The free exercise issue appears to arise only when the state imposes a generally applicable law, and the person coming within the purview of the legislation seeks exemption under the Free Exercise Clause.

92. *Smith*'s majority opinion specifically called attention to the role of the states in promulgating health and safety statutes: "[I]t is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief." *Smith*, 110 S. Ct. at 1604 n.2.

93. See *supra* note 53 for an explanation of the Seal of Confession.

94. In the Roman Catholic tradition, the Code of Canon Law provides the juridical status of priest-penitent responsibilities. Several Code provisions address the inviolability of the Seal of Confession and the consequences of a breach of the Seal. Two provisions establish the confidentiality of confession: "The sacramental seal is inviolable; therefore, it is a crime for a confessor in any way to betray a penitent by word or in any other manner or for any reason," 1983 CODE c.983, § 1, and "Even if every danger of revelation is excluded, a confessor is absolutely forbidden to use knowledge acquired from confession when it might harm the peni-

dentiality within a 1500-year-old tradition?[95] Can a state statute mandating child abuse reporting extinguish that codified tradition regardless of where the communications occurred? Can a state statute extinguish that exercise of religion? Can *Smith*'s abandonment of the compelling state interest test when such religious conduct conflicts with a generally applicable state statute extinguish the free exercise guarantee? These are the questions posed by the present gauntlet tossed before the Free Exercise Clause.[96]

Any statute mandating reporting by Roman Catholic priests[97]

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tent." *Id.* c.984, § 1. One provision establishes the penalties for violation of the Seal: "A confessor who directly violates the seal of confession incurs an automatic (latae sententiae) excommunication reserved to the [Apostolic] See; if he does so only indirectly, he is to be punished in accord with the seriousness of the offense." *Id.* c.1388, § 1. The consequences of excommunication include ineligibility for membership: "One who has publicly rejected the Catholic faith or abandoned ecclesiastical communion or been punished with an imposed or declared excommunication cannot be validly received into public associations," *id.* c.316, § 1; a ban from Holy Communion: "Those who are excommunicated or interdicted after the imposition or declaration of the penalty and others who obstinately persist in manifest grave sin are not to be admitted to Holy Communion," *id.* c.915; and other prohibitions:

> An excommunicated person is forbidden:
>
> 1. to have any ministerial participation in celebrating the Eucharistic Sacrifice or in any other ceremonies whatsoever of public worship;
>
> 2. to celebrate the sacraments and sacramentals and to receive the sacraments;
>
> 3. to discharge any ecclesiastical offices, ministries or functions whatsoever, or to place acts of governance.

*Id.* c.1331, § 1. Additional penalties may be warranted: "If long lasting contumacy or the seriousness of scandal warrants it, other penalties can be added including dismissal from the clerical state." *Id.* c.1364, § 2.

95. The Code of Canon Law admits no exceptions to the confidentiality of the confessional:

> Neither the canon nor earlier interpretations admit exceptions to the norm. . . . No distinction is made among the matters confessed, whether the sinful action itself or attendant circumstances, or the acts of satisfaction or penances imposed, etc. The secrecy concerning the penitent and his or her confession of sins that is to be maintained is properly described as total.

CODE OF CANON LAW, *supra* note 53, at 691. Violation of the Seal of Confession has traditionally been one of the most severely penalized offenses: "The seriousness of the offense [of violating the Seal] is clear from the fact that it is one of only five excommunications reserved to the Holy See." *Id.* at 927.

96. Note that the Court's abandonment of the compelling state interest test is especially sensitive for religious beliefs not as well-documented or objective as the Roman Catholic Sacrament of Penance. *See Smith*, 110 S. Ct. at 1613 (O'Connor, J., concurring) (history of free exercise doctrine shows harsh impact of majoritarian rule on unpopular or emerging religious groups). Religious beliefs held by a minority faith are the ones historically most in need of First Amendment protection. *Id.*; *see also* McConnell, *supra* note 4, at 1516 (noting that without free exercise protection smaller sects are in danger of assimilation into our "secularized protestant culture").

97. *See, e.g.*, CONN. GEN. STAT. § 17a-101(b) (West Supp. 1991) ("Any . . . cler[ic] . . . who has reasonable cause to suspect or believe that any child . . . has had physical injury or injuries inflicted upon him . . . shall report."); N.H. REV. STAT. ANN. § 169-C:29 (1990)

presents the question of how to accommodate an objective exercise of religion, rather than an instance where "each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[98] The Roman Catholic observance of the Seal of Confession is not a personal belief, but an historically objective fact, the violation of which entails the most severe penalties.

The impact of the gauntlet will affect more than the Roman Catholic religion because the Court's response must address both the constitutional guarantees governing religion and the role of religion within our pluralistic society. Any response that restricts the free exercise of religion will raise questions about the Court's willingness to afford protection to religion in the manner that the First Amendment affords protection to the dissenter;[99] the Fourth, Fifth and Sixth Amendments to the criminal defendant;[100] and the Free Exercise Clause historically afforded to the religious minority.[101] If the *Smith* decision is interpreted as a delegation of authority to the states to do what they will,[102] the Court must confront the fact that religion will not always find redress within the political process of democratic government.[103] Such a failure of the

("Any . . . priest . . . having reason to suspect that a child has been abused or neglected shall report.").

98. *Smith*, 110 S. Ct. at 1606. As a matter for conjecture, it would seem that the inappropriateness of judicial investigation into various religious practices was at the essence of the majority decision prompting discontinuance of the compelling state interest test. This practice would be used most often within minority religions and personal beliefs. Yet, it has been argued that the historical reason for the Free Exercise Clause was the protection of such minority religious expressions in the face of insufficient political influence. *See generally* McConnell, *supra* note 4, at 1437 (analyzing historical foundation of Free Exercise Clause).

99. *See, e.g.*, United States v. Eichman, 110 S. Ct. 2404 (1990) (upholding right to burn flag as political expression protected by First Amendment).

100. *See, e.g.*, Powell v. Texas, 492 U.S. 680 (1989) (convicted criminal defendant denied counsel prior to psychiatric evaluation was denied Sixth Amendment right to counsel); United States v. Halper, 490 U.S. 435 (1989) (subsequent civil suit by government against convicted criminal defendant violated Double Jeopardy Clause of Fifth Amendment); Skinner v. Railway Labor Executive's Ass'n, 489 U.S. 602 (1989) (employee drug testing subject to Fourth Amendment limits on search and seizure).

101. *See, e.g.*, Frazee v. Department of Employment Sec., 489 U.S. 829 (1989) (denial of unemployment benefits to employee who refused to work on Sunday based on religious beliefs violated First Amendment Free Exercise Clause).

102. *See Smith*, 110 S. Ct. at 1606.

103. *Id.* Justice Scalia wrote for the majority that the political process renders "unavoidable" the consequence that those religious practices not widely engaged in will place those practicing them at a "relative disadvantage" within the political process. *Id.* However, the political process encompasses the constitutional guarantee of individual liberty, and it can be argued that the Free Exercise Clause was intended as a specific guarantee to protect the rights of minority religions within the political process, thereby promoting pluralism. In sum, state and federal legislative processes are imbued with First Amendment values and must operate in tandem with the free exercise guarantee.

political process is especially likely for those minority religions historically protected by judicial intervention.[104]

Thus, the challenge presented by the abandonment of the compelling state interest test is a difficult one because the easier accommodation of religious conduct is gone. The compelling state interest test required an urgent state goal and a narrowly tailored means to justify the burden on free exercise. But after *Smith*, the Court must confront religion directly and must address the issue of what is religion and what is not, in order to determine exactly which beliefs and conduct fall within the constitutional protections afforded to free exercise. Religion cannot be denied protection, even if it cannot muster political influence. Neither can the free exercise of religion be accommodated through a substantial compliance performance, particularly in the case of historical and well-documented religious practices. For example, a priest cannot keep silent as to *most* of a parishioner's confession. No religion is likely to accept such a halfway point, and for the courts to seek such an accommodation through a balancing of interests would further entangle the judiciary in religious inquiries. Thus, the *Smith* decision has resulted in a gauntlet pending before the Free Exercise Clause.

## II. STATE CHILD ABUSE REPORTING REQUIREMENTS

The constitutional issues raised by mandatory child abuse reporting statutes are framed amidst the emotional trauma surrounding child abuse and the "fix-it" appeal of the statutes. The proliferation of reporting statutes attests to their political popularity.[105] The state has a compelling public interest in protecting children, particularly from the trauma of abuse, which has been manifested by including reporting requirements among the states' child abuse laws.[106] Some statutes are broad in scope,

104. *See* McConnell, *supra* note 4, at 1516.

105. See *infra* note 106 for a list of state reporting statutes. With the surge of advancing medical diagnostic techniques in the early 1960s, indications of child abuse became more readily detectable by physicians. *See* IRVING J. SLOAN, CHILD ABUSE: GOVERNING LAW & LEGISLATION 15 (1983) (enactment of reporting laws coincided with first formalized medical profile of abused child and increased awareness of problem); *see* O'Brien, *supra* note 18, at 100 (medical advances have made child abuse liability verifiable).

In 1963, the Children's Bureau of the Department of Health, Education and Welfare proposed a statutory framework that would require physicians to report suspected abuse. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, THE ABUSED CHILD: PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD (1963). By 1967, all fifty states had enacted some form of legislation addressing the problem of child abuse with reporting laws. *See* Mitchell, *supra* note 55, at 727. Since then, statutes have been amended to broaden the scope of who must report and what forms of abuse must be reported. *Id.*

106. *See* ALA. CODE §§ 26-14-3, -4 (1986 & Supp. 1990) (mandatory reporting by specified

professionals, not including clergy, and any person called upon to render aid or medical assistance to child abuse victim); ALASKA STAT. § 47.17.020 (1990) (mandatory reporting by specified professionals not including clergy); ARIZ. REV. STAT. ANN. § 13-3620(A), (B), (G) (1989 & Supp. 1990) (mandatory reporting by specified professionals or any person responsible for care or treatment of children expressly including clergy); ARK. CODE ANN. § 12-12-507 (Michie Supp. 1991) (mandatory reporting by specified professionals not including clergy); CAL. PENAL CODE §§ 11165-11166 (West 1982 & Supp. 1991) (mandatory reporting by specified professionals including religious practitioners who diagnose, examine or treat children); COLO. REV. STAT. § 19-3-304 (Supp. 1990) (mandatory reporting by specified professionals including Christian Science practitioners); CONN. GEN. STAT. ANN. §§ 17a-101(b), -103 (West Supp. 1991) (mandatory reporting by specified professionals, expressly including clergy, and any person not specified who has reasonable cause to suspect child abuse or neglect); DEL. CODE ANN. tit. 16, § 903 (1983) (mandatory reporting by specified professionals, not including clergy, and any person who suspects child abuse); D.C. CODE ANN. § 2-1352 (1989 & Supp. 1991) (mandatory reporting by specified professionals not including clergy); FLA. STAT. ANN. § 415.504 (West 1986 & Supp. 1991) (mandatory reporting by specified professionals and by any person who suspects child abuse or neglect, but specifically upholding clergy communicant privilege); GA. CODE ANN. § 74-111 (Harrison 1981 & Supp. 1989) (mandatory reporting by specified professionals not including clergy); HAW. REV. STAT. § 350-1.1 (1985 & Supp. 1990) (mandatory reporting by specified professionals not including clergy); IDAHO CODE § 16-1619 (1979 & Supp. 1991) (mandatory reporting by specified professionals, not including clergy, and any person who suspects child abuse); ILL. ANN. STAT. ch. 23, para. 2054 (Smith-Hurd 1988 & Supp. 1991) (mandatory reporting by specified professionals including clergy except Christian Science practitioners); IND. CODE ANN. § 31-6-11-3 (Burns 1987 & Supp. 1991) (mandatory reporting by any person); IOWA CODE ANN. § 232.69 (West 1985 & Supp. 1991) (mandatory reporting by specified professionals not including clergy); KAN. STAT. ANN. § 38-1522 (1986 & Supp. 1990) (mandatory reporting by specified professionals not including clergy); KY. REV. STAT. ANN. §§ 620.030, .050(2) (Michie/Bobbs-Merrill 1990) (mandatory reporting by any person but clergy-penitent privilege provides grounds for refusing to report); LA. REV. STAT. ANN. § 14:403(B), (C) (West 1986 & Supp. 1991) (mandatory reporting by specified professionals including clergy except where knowledge acquired during confession or sacred communication); ME. REV. STAT. ANN. tit. 22, § 4011 (West Supp. 1990) (mandatory reporting by specified professionals not including clergy); MD. FAM. LAW CODE ANN. §§ 5-704, -705 (1984 & Supp. 1990) (mandatory reporting by specified professionals; mandatory reporting by any person, but upholding clergy-communicant privilege as grounds not to report); MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1991) (mandatory reporting by specified professionals not including clergy); MICH. STAT. ANN. § 25.248(3)-(4) (Callaghan 1984 & Supp. 1991) (mandatory reporting by specified professionals not including clergy); MINN. STAT. ANN. § 626.556 (West 1983 & Supp. 1991) (mandatory reporting by specified professionals including clergy except where reporting violates clergy-communicant privilege); MISS. CODE ANN. § 43-21-353 (1981 & Supp. 1991) (mandatory reporting by specified professionals including clergy and any person who suspects child abuse); MO. ANN. STAT. § 210.115 (Vernon 1983 & Supp. 1991) (mandatory reporting by specified professionals not including clergy); MONT. CODE ANN. § 41-3-201 (1990) (mandatory reporting by specified professionals including Christian Science practitioners and religious healers); NEB. REV. STAT. § 28-711 (1989) (mandatory reporting by specified professionals not including clergy or any other person with reasonable cause to suspect child abuse); NEV. REV. STAT. ANN. § 432B.220 (Michie 1986 & Supp. 1989) (mandatory reporting by specified professionals including clergy unless knowledge obtained from offender during confession); N.H. REV. STAT. ANN. § 169-C:29 (1990 & Supp. 1990) (mandatory reporting by specified professionals including clergy); N.J. STAT. ANN. § 9:6-8.10 (West 1976 & Supp. 1991) (mandatory reporting by any person); N.M. STAT. ANN. § 32-1-15 (Michie 1989 & Supp. 1991) (mandatory reporting by specified profes-

requiring *anyone* who suspects child abuse to report.[107] Some statutes specify particular classes of people who must report.[108] Most states in-

sionals not including clergy and any person who suspects child abuse); N.Y. SOC. SERV. LAW § 413 (McKinney 1983 & Supp. 1991) (mandatory reporting by specified professionals including Christian Science practitioners); N.C. GEN. STAT. § 7A-543 (1990 & Supp. 1990) (mandatory reporting by any person or institution that suspects child abuse); N.D. CENT. CODE § 50-25.1-03 (1989 & Supp. 1991) (mandatory reporting by specified professionals including clergy unless knowledge acquired in capacity as spiritual adviser); OHIO REV. CODE ANN. § 2151.42.1 (Anderson 1990 & Supp. 1990) (mandatory reporting by specified professionals including persons rendering spiritual treatment through prayer in accordance with the tenets of well-recognized religion); OKLA. STAT. ANN. tit. 21, § 846 (West 1983 & Supp. 1991) (mandatory reporting by specified professionals and any person who suspects child abuse); OR. REV. STAT. § 418.750 (1987 & Supp. 1990) (mandatory reporting by any public or private official unless knowledge obtained by privileged communication with psychiatrist, psychologist, clergy or attorney); 23 PA. CONS. STAT. ANN. § 6311 (Supp. 1991) (mandatory reporting by specified professionals including Christian Science practitioners and any professional who has contact with children); R.I. GEN. LAWS §§ 40-11-3, -11 (1990) (mandatory reporting by any person and abrogation of all privileges except attorney-client as grounds for failure to report); S.C. CODE ANN. §§ 20-7-510, -550 (Law. Co-op. 1985 & Supp. 1990) (mandatory reporting by specified professionals including Christian Science practitioners and religious healers but expressly upholding priest-penitent privilege as grounds for failure to report); S.D. CODIFIED LAWS ANN. §§ 26-8A-3, -4 (Supp. 1991) (mandatory reporting by specified professionals including religious healing practitioners and in case of death from child abuse any person must report); TENN. CODE ANN. § 37-1-403 (1984 & Supp. 1990) (mandatory reporting by specified professionals, not including clergy, and any person who has reason to know or renders aid to child abuse victim); TEX. FAM. CODE ANN. § 34.01 (West 1986 & Supp. 1991) (mandatory reporting by any person); UTAH CODE ANN. § 62A-4-503 (1989 & Supp. 1990) (mandatory reporting by any person including clergy unless sole source of information is perpetrator's confession); VT. STAT. ANN. tit. 33, § 4913 (Supp. 1990) (mandatory reporting by specified professionals not including clergy); VA. CODE ANN. § 63.1-248.3 (Michie 1987 & Supp. 1990) (mandatory reporting by specified professionals including Christian Science practitioners); WASH. REV. CODE ANN. § 26.44.030 (West 1986 & Supp. 1991) (mandatory reporting by specified professionals not including clergy); W. VA. CODE § 49-6A-2 (1986) (mandatory reporting by specified professionals including Christian Science practitioners and religious healers); WIS. STAT. ANN. § 48.981(2) (West 1987 & Supp. 1990) (mandatory reporting by specified professionals not including clergy); WYO. STAT. ANN. § 14-3-205 (Michie 1986 & Supp. 1991) (mandatory reporting by any person); P.R. LAWS ANN. tit. 8, § 406 (Supp. 1988) (mandatory reporting by specified professionals not including clergy); V.I. CODE ANN. tit. 5, § 2533 (Supp. 1990) (mandatory reporting by specified professionals not including clergy).

107. For example, the Delaware statute states: "Any physician, and any other person in the healing arts including any person licensed to render services in medicine, osteopathy, dentistry, any intern, resident, nurse, school employee, social worker, psychologist, medical examiner *or any other person who knows or reasonably suspects child abuse or neglect* shall make a report." DEL. CODE ANN. tit. 16 § 903 (1983) (emphasis added).

108. For example, the Colorado statute requires reporting by a typically detailed list of specified professionals:

clude a permissive reporting provision, stating that any person not included under the mandatory provision *may* report suspected abuse.[109]

### *A. Achieving the State's Purpose of Protecting Children From Abuse*

Generally, all fifty states express a similar purpose for their reporting statutes: the protection of children.[110] The express terms of the stat-

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Persons required to report such abuse or neglect or circumstances or conditions shall include any:
(a) Physician or surgeon, including a physician in training;
(b) Child health associate;
(c) Medical examiner or coroner;
(d) Dentist;
(e) Osteopath;
(f) Optometrist;
(g) Chiropractor;
(h) Chiropodist or podiatrist;
(i) Registered nurse or licensed practical nurse;
(j) Hospital personnel engaged in the admission, care, or treatment of patients;
(k) Christian Science practitioner;
(l) Public or private school official or employee;
(m) Social worker or worker in family care home, employer-sponsored on-site child care center, or child care center as defined in section 26-6-102, C.R.S.;
(n) Mental health professional;
(o) Dental hygienist;
(p) Psychologist;
(q) Physical therapist;
(r) Veterinarian;
(s) Peace officer as defined in section 18-1-901(3)(l), C.R.S.;
(t) Pharmacist;
(u) Commercial film and photographic print processor as provided in subsection (2.5) of this section.

COLO. REV. STAT. § 19-3-304 (Supp. 1990); *see also* CAL. PENAL CODE §§ 11165-11166 (West 1982 & Supp. 1991) (stating that any child care custodian, health practitioner or employee of child protective agency shall report known or suspected cases of child abuse).

109. For example the Arkansas statute has both a mandatory reporting provision, ARK. CODE ANN. § 12-12-507(b) (Michie 1991), and a permissive provision which *allows* reporting by any other person: "*Any person* with reasonable cause to suspect child maltreatment, or that a child has died as a result of child maltreatment, or who observes a child being subjected to conditions or circumstances which would reasonably result in child maltreatment, *may immediately notify* central intake or law enforcement." *Id.* § 12-12-507(a) (Michie 1991) (emphasis added); *see also* CAL. PENAL CODE § 11166 (West 1982 & Supp. 1991).

110. For example, the Alaska statute states:

> In order to protect children whose health and well-being may be adversely affected through the infliction, by other than accidental means, of harm through physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment, the legislature requires the reporting of these cases by practitioners of the healing arts and others to the department. . . . It is the intent of the legislature that, as a result of these reports, protective services will be made available *in an effort to (1) prevent further harm to the child; (2) safeguard and enhance the general well-being of the children in this state; and (3) preserve family life unless that effort is likely to result in physical or emotional damage to the child.*

ALASKA STAT. § 47.17.010 (1990) (emphasis added).

Although each state defines its purpose differently, all fifty states use similar terms and the purposes are essentially identical. This purpose, however, is not always manifested in state

utes make it obvious that the reporting requirements are intended to initiate preventative measures by proper authorities to guard against future abuse.[111] In addition to providing safeguards for children, these reporting statutes are aimed at protecting the integrity of the family unit.[112] It follows, then, that reporting provisions are designed to ensure that children can develop normally through growth in a proper mental, physical and emotional atmosphere.

In light of these purposes, when the abuser of a child is one or both of the child's parents, the state should also have an interest in ensuring that the parent receive either therapy or some other form of support to facilitate returning the child to an integrated family atmosphere. Consider the situation where parents have confessed to a cleric that they have abused, or will abuse again, their own child.[113] Under the mandates of the state reporting requirement,[114] the cleric would have to report the situation to the proper authorities. Aside from religious doctrinal prohibitions against reporting the case,[115] theoretical reservations arise as well. Presumably, the parents are seeking spiritual guidance in order to discontinue the abuse.[116] They have expressed a wish to seek reconciliation according to religious tenets, and in order to do so must make a good faith effort to cease the abusive actions. The very act of "confessing" is a means for these parents to treat the problem individually. Furthermore, the penitential rite is a means to reestablish an integrated family atmosphere in which the child can develop.

In such an instance, the end furthered by a religious practice conforms with the state purpose underlying reporting statutes. However, if the parents anticipated that the cleric would report their confidences to the authorities, it is unlikely that they would confess and seek this reli-

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action, as shown by the state's lack of involvement in certain cases, such as the case of Joshua DeShaney. *See* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989). See *infra* notes 235-46 and accompanying text for a discussion of the *DeShaney* case.

111. *See, e.g.*, ALASKA STAT. § 47.17.010 (1990) (intent of legislature to prevent further harm to child).

112. *See id.*

113. *See, e.g.*, State v. Motherwell, 788 P.2d 1066, 1067 (Wash. 1990). See *supra* notes 29-40 and accompanying text for a discussion of the facts in *Motherwell*.

114. For purposes of this example, the state requirement will be one which would require the priest to report any suspected case of child abuse. *See, e.g.*, CONN. GEN. STAT. ANN. § 17a-101(b) (West Supp. 1991); N.H. REV. STAT. ANN. § 169-C:29 (1990 & Supp. 1990).

115. At least in the Roman Catholic faith, a priest who breaks the confidentiality of the confessional will be excommunicated. See *supra* notes 94-95 and accompanying text for a discussion of the Seal of Confession and the Code of Canon Law.

116. See *infra* notes 206-09 and accompanying text for a discussion of clergy qualifications to counsel in cases of child abuse.

gious means to resolution.[117] Requiring the cleric to report in this situation may be counter-productive because reporting would discourage a process that may lead to the end of the abuse and promotion of family healing. In such a case, the objective religious practice of the Sacrament of Penance also serves a socially desirable purpose, and a court may more readily conclude that the conduct is protected under the First Amendment.

### *B. Elements and Conditions in Child Abuse Reporting Statutes*

Child abuse reporting statutes differ according to who must report,[118] who may report,[119] and what must be reported.[120] Statutes also

117. Researchers have recently reported that a Maryland law mandating psychotherapists to report child abuse deters abusers from seeking treatment. MD. FAM. LAW CODE ANN. § 5-704 (1984 & Supp. 1990) (mandatory reporting by health practitioners, police officers, educators and human service workers). According to a study conducted at the Johns Hopkins Sexual Disorders Clinic, the Maryland law "frustrates therapists' ability to detect and intervene in active pedophilia . . . because abusers' fear of prosecution keeps them from admitting their actions." Paul W. Valentine, *Maryland Child Abuse Law Called Deterrent to Treatment*, WASH. POST, Apr. 12, 1991, at A9. Statistics revealed in the study showed that 73 child abusers voluntarily sought help at the Sexual Disorders Clinic from 1979 to 1989; however, since July 1989, when the Maryland law became effective, no child abusers have voluntarily sought treatment at the clinic. *Id.* "Now, without the assurance of confidentiality under the reporting requirement and the reluctance of patients to disclose their activity, . . . it is more difficult to intervene. An unknown number of children may be jeopardized." *Id.* (quoting Fred S. Berlin, Director, Johns Hopkins Sexual Disorders Clinic).

118. *See* JOHN C. BUSH & WILLIAM H. TIEMANN, THE RIGHT TO SILENCE: PRIVILEGED CLERGY COMMUNICATION AND THE LAW 249-56 (3d ed. 1989) (some state statutes require any person to report, while others designate particular classes of people such as "clergy," "Christian Science practitioners," "marriage and family counselors" or "religious healers and counselors").

119. *See id.* (most states allow "any person with reasonable cause to suspect abuse or neglect" to report).

120. Generally, all states require similar information in reporting. For example, the Alabama statute states:

> The reports provided for in this chapter shall state, if known, the name of the child, his [or her] whereabouts, the names and addresses of the parents, guardian or caretaker and the character and extent of his [or her] injuries. The written report shall also contain, if known, any evidence of previous injuries to said child and any other pertinent information which might establish the cause of such injury or injuries, and the identity of the person or persons responsible for the same.

ALA. CODE § 26-14-5 (1986).

impose various penalties for failure to report,[121] and some recognize certain privileges not to report.[122]

### 1. Who must report

Not all statutes have the same requirements for who must report.[123] In general, the statutes require reporting from classes of people who hold positions that would make them aware of instances of child abuse. For example, because physicians are likely to diagnose and suspect child abuse, they are required to report such abuse in all fifty states.[124] Most states require reports from health care providers, educators, law enforcement officers, and social workers, since these professionals also have much contact with children.[125] Eight states expressly require reports from clergy.[126] Fifteen states envelop all of these groups, including

121. Most states classify the failure to report as a misdemeanor, punishable by no more than six months in jail or by a fine of not more than $500.00. *See, e.g.*, ALA. CODE § 26-14-13 (1986 & Supp. 1990).

The Arkansas statute imposes civil liability for failure to report, stating: "Any person, official, or institution required . . . to make notification of suspected child maltreatment who willfully fails to do so, shall be civilly liable for damages proximately caused by that failure." ARK. CODE ANN. § 12-12-504(b) (Michie Supp. 1991).

122. For example, the Maryland reporting statute expressly upholds the clergy-communicant privilege:

> A minister of the gospel, cler[ic], or priest of an established church of any denomination is not required to provide notice [of child abuse or neglect] if the notice would disclose matter in relation to any communication described in [the clergy-communicant privilege statute] and:
>
> (i) the communication was made to the minister, cler[ic], or priest in a professional character in the course of discipline enjoined by the church to which the minister, cler[ic], or priest belongs; and
>
> (ii) the minister, cler[ic], or priest is bound to maintain the confidentiality of that communication under canon law, church doctrine, or practice.

MD. FAM. LAW CODE ANN. § 5-705(a)(3) (Supp. 1990). *But cf.* BUSH & TIEMANN, *supra* note 118, at 249-56 (listing privileges abrogated by each state statute).

123. *See* BUSH & TIEMANN, *supra* note 118, at 249-56.

124. *See* Mitchell, *supra* note 55, at 728. In recent years there has been a growing public and professional awareness of child abuse. As a result the spectrum of abuse being reported has broadened compared to the last decade. Marshall et al., *supra* note 22, at 664. "[M]ore children are being brought for evaluation, sexual abuse is the most frequent complaint and most often involves preschoolers, and more clinically subtle abuse is being seen." *Id.*

125. *See* Mitchell, *supra* note 55, at 728.

126. ARIZ. REV. STAT. ANN. § 13-3620(A), (G) (1989 & Supp. 1990) ("Any . . . cler[ic] or priest . . . shall immediately report [information regarding child abuse or neglect] . . . . Nothing . . . discharges a cler[ic] or priest from the duty to report."); CONN. GEN. STAT. ANN. § 17a-101(b) (West Supp. 1991) ("Any . . . cler[ic], . . . shall report or cause a report to be made."); LA. REV. STAT. ANN. § 14:403(B), (C) (West 1986 & Supp. 1991) ("priest, rabbi, [and] duly ordained minister" qualifies as "mandatory reporter" who must report abuse unless knowledge was acquired "during a confession or other sacred communication."); MINN. STAT. ANN. § 626.556(3)(a) (West Supp. 1991) ("A person . . . shall immediately report . . . if the person is: . . . (2) employed as a member of the clergy and received the information while

clergy, by simply requiring *any* person who suspects child abuse to report it.[127]

Most states use a central registry to track reports of child abuse and assure that all reports remain confidential.[128] Also, some give reporters immunity from any civil or criminal liability that might otherwise result from reporting suspected child abuse, providing they act in good faith.[129]

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engaged in ministerial duties, provided that a member of the clergy is not required . . . to report information that is otherwise privileged."); MISS. CODE ANN. § 43-21-353(1) (1981 & Supp. 1991) ("Any . . . minister . . . shall cause an oral report to be made immediately by telephone or otherwise and followed as soon thereafter as possible by a report in writing."); NEV. REV. STAT. ANN. § 432B.220(2) (Michie 1986 & Supp. 1989) ("Reports must be made by . . . [a] cler[ic], practitioner of Christian Science or religious healer, unless he [or she] has acquired the knowledge of the abuse or neglect from the offender during a confession."); N.H. REV. STAT. ANN. § 169-C:29 (1990 & Supp. 1990) ("Any . . . priest, minister, or rabbi . . . shall report."); UTAH CODE ANN. § 62A-4-503(3) (1989 & Supp. 1990) ("If a cler[ic] or priest receives information about abuse or neglect from any source other than confession of the perpetrator, he [or she] is required to give notification.").

127. For example, the Mississippi statute states:

> Any attorney, physician, dentist, intern, resident, nurse, psychologist, teacher, social worker, school principal, child care giver, minister, law enforcement officer, *or any other person having reasonable cause to suspect that a child brought to him [or her]. . . is a neglected child or an abused child,* shall cause an oral report to be made immediately.

MISS. CODE ANN. § 43-21-353(1) (1972 & Supp. 1991) (emphasis added); *see also* ALA. CODE § 26-14-3 (1986 & Supp. 1990); DEL. CODE ANN. tit. 16, § 903 (1983); IDAHO CODE § 16-1619 (1979 & Supp. 1991); IND. CODE ANN. § 31-6-11-3 (Burns 1987 & Supp. 1991); NEB. REV. STAT. § 28-711 (1989); N.J. STAT. ANN. § 9:6-8.10 (West 1976 & Supp. 1991); N.M. STAT. ANN. § 32-1-15 (Michie 1989 & Supp. 1991); N.C. GEN. STAT. § 7A-543 (1990 & Supp. 1990); OKLA. STAT. ANN. tit. 21, § 846 (West 1983 & Supp. 1991); R.I. GEN. LAWS § 40-11-3 (1990); S.D. CODIFIED LAWS ANN. § 26-8A-4 (Supp. 1991); TENN. CODE ANN. § 37-1-403 (1984 & Supp. 1990); TEX. FAM. CODE ANN. § 34.01 (West 1986 & Supp. 1991); WYO. STAT. ANN. § 14-3-205(a) (Michie 1986 & Supp. 1991).

128. For example, the Alabama statute states:

> (a) The state department of human resources shall establish a statewide central registry for reports of child abuse and neglect made pursuant to . . . . (b) The state department of human resources shall establish and enforce reasonable rules and regulations governing the custody, use and preservation of the reports and records of child abuse and neglect. . . . The reports and records of child abuse and neglect shall be confidential, and shall not be used or disclosed for any [other] purpose.

ALA. CODE § 26-14-8 (1975 & Supp. 1990); *see also* COLO. REV. STAT. §§ 19-3-307, -313 (Supp. 1990); FLA. STAT. ANN. § 415.504 (West 1986 & Supp. 1991); LA. REV. STAT. ANN. § 14:403 (West 1986 & Supp. 1991); MASS. GEN. LAWS ANN. ch. 119, § 51F (West Supp. 1991); WYO. STAT. ANN. § 14-3-213 (Michie 1986).

129. *See, e.g.*, MINN. STAT. ANN. § 626.556(4) (West 1983 & Supp 1991). The Minnesota statuté provides in pertinent part:

> (a) The following persons are immune from any civil or criminal liability that otherwise might result from their actions, if they are acting in good faith:
>
> (1) any person making a voluntary or mandated report under subdivision 3 [which includes clergy] . . . or assisting in an assessment under this section . . . ;
>
> . . . .
>
> (c) This subdivision does not provide immunity to any person for failure to make a required report or for committing neglect, physical abuse, or sexual abuse of a child.

In addition to criminal penalties for failure to report suspected cases of child abuse,[130] the reporter may face civil liability for failure to report under a negligence or a malpractice cause of action as well.[131] For example, in *Landeros v. Flood*[132] the California Supreme Court upheld the liability of a physician for negligently failing to diagnose a case of battered child syndrome and subsequently failing to report it.[133]

### 2. Privileges and abrogations

Many reporting statutes recognize either a confidential communication privilege within the reporting law itself[134] or expressly abrogate one or all privileges.[135] Most statutes eliminate the physician-patient and the husband-wife privileges.[136] Other statutes specifically abolish the privilege of psychotherapists,[137] psychologists,[138] registered nurses,[139] social

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*Id.*

130. *See, e.g.*, ARK. CODE ANN. § 12-12-504(b) (Michie Supp. 1991); *see supra* note 121 and accompanying text.

131. See *supra* note 121 for the text of the Arkansas statute.

132. 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976).

133. *Id.* at 412, 551 P.2d at 396, 131 Cal. Rptr. at 76. *But see* Fischer v. Metcalf, 543 So. 2d 785, 786 (Fla. 1989) (dismissing claims by mother and daughter against father's psychiatrist who failed to report child abuse pursuant to Florida reporting statute).

134. *See, e.g.*, ALA. CODE § 26-14-8 (1986 & Supp. 1990); ARIZ. REV. STAT. ANN. § 13-3620(F) (1989 & Supp. 1990).

135. *See* BUSH & TIEMANN, *supra* note 118, at 249-56. For example, Pennsylvania abrogates all privileges: "The privileged communication between any professional person required to report and the patient or client of that person shall not apply to situations involving child abuse and shall not constitute grounds for failure to report as required by this chapter." 23 PA. CONS. STAT. ANN. § 6311(a) (Supp. 1991). New Hampshire, on the other hand, abrogates certain privileges, but not the attorney-client privilege: "The privileged quality of communication between husband and wife and any professional person and his [or her] patient or client, *except that between attorney and client*, shall not apply to proceedings instituted pursuant to this chapter and shall not constitute grounds for failure to report as required by this chapter." N.H. REV. STAT. ANN. § 169-C:32 (1990) (emphasis added).

136. *See* BUSH & TIEMANN, *supra* note 118, at 249-56. In a recent case involving a four-year-old boy who was scalded in an outdoor barbecue pit by his stepfather for not being able to count to ten, the boy's father was incarcerated for 18 months. *Maryland Stepfather Is Given 18-Month Term for Abuse*, WASH. POST, Nov. 29, 1990, at A35. The mother served the same length of time for failure to intercede on the boy's behalf even though the father was convicted of the more serious crime of child abuse. *Id.* In addition to being guilty for failure to report, the mother in this case would also have to testify against her husband upon abrogation of the husband-wife privilege. MD. FAM. LAW CODE ANN. § 5-705 (Michie 1984 & Supp. 1991) (requires any person who suspects child abuse to report and supersedes privileged communication statutes).

137. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1991).

138. *See, e.g.*, TENN. CODE ANN. § 37-1-411 (1984 & Supp. 1990).

139. *See, e.g.*, COLO. REV. STAT. § 19-3-304(2)(i) (Supp. 1990).

workers[140] and school counselors.[141] Four states nullify all privileges,[142] while eleven additional states abrogate all privileges except the attorney-client privilege.[143] Regarding the clergy privilege, some states draw a distinction between abrogating the privilege for reporting as opposed to testifying at a proceeding resulting from a report.[144] In other states, the

140. *See* MASS. GEN. LAWS ANN. ch. 119, § 51A-F (West Supp. 1991).

141. For example, the South Dakota statute states in part: "Any . . . school counselor [or] school official . . . [having] reasonable cause to suspect that a child . . . has been abused or neglected shall report that information." S.D. CODIFIED LAWS ANN. § 26-8A-3 (Supp. 1991).

142. For example, the Georgia statute states:

> Suspected child abuse which is required to be reported by any person pursuant to this Code section shall be reported notwithstanding that the reasonable cause to believe such abuse has occurred or is occurring is based in whole or in part upon any communication to that person which is otherwise made privileged or confidential by law.

GA. CODE ANN. § 19-7-5(g) (Harrison 1990); *see also* ILL. ANN. STAT. ch. 23, para. 2054 (Smith-Hurd 1988 & Supp. 1991); MONT. CODE ANN. § 41-3-201(4) (1990); 23 PA. CONS. STAT. ANN. § 6311 (Supp. 1991).

143. *See* ALA. CODE § 26-14-10 (1986); ARK. CODE ANN. § 12-12-518 (Michie Supp. 1991); DEL. CODE ANN. tit. 16, § 908 (1983 & Supp. 1990); KY. REV. STAT. ANN. § 620.050(2) (Michie/Bobbs-Merrill 1990); MO. ANN. STAT. § 210.140 (Vernon 1983 & Supp. 1991); N.H. REV. STAT. ANN. § 169-C:32 (1990); N.D. CENT. CODE § 50-25.1-10 (1989); R.I. GEN. LAWS § 40-11-11 (1990); TENN. CODE ANN. § 37-1-614 (1991); TEX. FAM. CODE ANN. § 34.04 (West 1986); W. VA. CODE § 49-6A-7 (1986).

144. Arizona, for example, mandates that a cleric report suspected cases of abuse, but does not allow a cleric to reveal confidential information as a witness in a proceeding resulting from the report. The Arizona statute states:

> In any civil or criminal litigation in which a child's neglect, dependency, abuse or abandonment is an issue, a cler[ic] or priest shall not, without his [or her] consent, be examined as a witness concerning any confession made to him [or her] in his [or her] role as a cler[ic] or a priest in the course of the discipline enjoined by the church to which he [or she] belongs. Nothing in this subsection discharges a cler[ic] or priest from the duty to report pursuant to subsection A of this section.

ARIZ. REV. STAT. ANN. § 13-3620(G) (1989 & Supp. 1990).

privilege not to report is expressly eliminated.[145] Some states expressly maintain the integrity of the clergy privilege.[146]

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145. In addition to the four states that abrogate *all* privileges, *see supra* note 142, the clergy privilege is specifically abrogated in Arizona, Nevada, Utah and Washington. *Id.*; NEV. REV. STAT. ANN. § 432B.220(2)(d) (Michie 1986 & Supp. 1989); UTAH CODE ANN. § 62A-4-503 (1989 & Supp. 1990); WASH. REV. CODE ANN. § 26.44.060(3) (1990).

Nevada and Utah, however, recognize the clergy privilege within the confines of the confessional. Under the Nevada statute, reports must be made by the following persons who, in their professional or occupational capacities, know or have reason to believe that a child has been abused or neglected: "[a] cler[ic] . . . unless he [or she] has acquired the knowledge of the abuse or neglect *from the offender* during a confession." NEV. REV. STAT. ANN. § 432B.220(2)(d) (emphasis added). Note that this statute would not protect communications such as those in *State v. Motherwell*, because the communication was not made by the offender. State v. Motherwell, 788 P.2d 1066, 1067 (Wash. 1990). See *supra* notes 29-40 and accompanying text for a discussion of the *Motherwell* case. Under section 49.255 of the Nevada law, "[a] cler[ic] or priest shall not, without the consent of the person making the confession, be examined as a witness as to any confession made to him [or her] in his [or her] professional character." NEV. REV. STAT. ANN. § 49.255 (Michie 1986 & Supp. 1990). Section 432B.250 abrogates the clergy privilege, however, concerning both reporting the suspected abuse and testifying during a proceeding resulting from a report of abuse:

> Any person required to report under [Nev. Rev. Stat.] 432B.220 may not invoke any of the privileges granted under chapter 49 of NRS:
>
> 1. For his [or her] failure to report as required under NRS 432B.220;
>
> 2. In cooperating with an agency which provides protective services or a guardian ad litem for a child; or
>
> 3. In any proceeding held pursuant to NRS 432B.410 to 432B.590, inclusive.

*Id.*

Similarly, Utah respects the clergy privilege within the context of the Seal of Confession. UTAH CODE ANN. § 62A-4-503. The Utah statute states:

> The notification requirements . . . do not apply to a cler[ic] or priest, without the consent of the person making the confession, with regard to any confession made to him [or her] in his [or her] professional character in the course of discipline enjoined by the church to which he [or she] belongs, if:
>
> (a) the confession was made directly to the cler[ic] or priest *by the perpetrator*; and
>
> (b) the cler[ic] or priest is, under canon law or church doctrine or practice, bound to maintain the confidentiality of that confession.
>
> *If a cler[ic] or priest receives information about abuse or neglect from any source other than confession of the perpetrator, he [or she] is required to give notification on the basis of that information even though he [or she] may have also received a report of abuse or neglect from the confession of the perpetrator.*

*Id.* (emphasis added). However, the limiting language of the statute would not protect communications such as those made in *Motherwell* where the reports of sexual abuse were made by a third party, not the offender. *Motherwell*, 788 P.2d at 1067; *see supra* notes 29-40.

Finally, the Washington child abuse reporting statute states that reporting by clergy does not violate the clergy privilege. WASH. REV. CODE ANN § 26.44.060(3). On its face, the Washington evidentiary privilege statute addresses the competency of witnesses to testify in judicial proceedings. *Id.* § 5.60.060(3) (West 1963 & Supp. 1991).

146. For example, the Florida statute states:

> The privileged quality of communication between husband and wife and between any professional person and his [or her] patient or client, and any other privileged communication except that between attorney and client [or confidential communications to clergy in their capacity as spiritual advisors], as such communication relates both to the competency of the witness and to the exclusion of confidential communica-

## III. THE CLERGY-COMMUNICANT EVIDENTIARY PRIVILEGE

Forty-nine states and the District of Columbia recognize the clergy-communicant privilege in their evidence laws.[147] Notwithstanding the distinction between a privilege from testifying about confidential communications and a privilege from reporting them, twenty-five states have reporting statutes that include the clergy.[148] Recognizing a clergy-com-

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tions, shall not apply to any situation involving known or suspected child abuse or neglect and shall not constitute grounds for failure to report as required . . . or failure to give evidence in any judicial proceeding relating to child abuse or neglect.

FLA. STAT. ANN. § 415.512 (West 1986).

147. ALA. CODE § 12-21-166 (1986 & Supp. 1990); ARIZ. REV. STAT. ANN. § 12-2233 (1982 & Supp. 1990) (civil); *id.* § 13-4062(3) (1989 & Supp. 1990) (criminal); ARK. R. EVID. 505; CAL. EVID. CODE §§ 912, 917, 1030-1034 (West 1966 & Supp. 1990); COLO. REV. STAT. § 13-90-107(c) (1987 & Supp. 1989); CONN. GEN. STAT. ANN. § 52-146(b) (West Supp. 1991); DEL. R. EVID. 505; D.C. CODE ANN. § 14-309 (1989); FLA. STAT. ANN. § 90.505 (West 1979 & Supp. 1991); GA. CODE ANN. § 38-419.1 (Harrison 1981 & Supp. 1989); HAW. R. EVID. 506; IDAHO CODE § 9-203(3) (1990); ILL. ANN. STAT. ch. 110, para. 8-803 (Smith-Hurd 1984); IND. CODE ANN. § 34-1-14-5 (Burns 1986 & Supp. 1990); IOWA CODE ANN. § 622.10 (West 1950 & Supp. 1990); KAN. STAT. ANN. § 60-429 (1983 & Supp. 1989); KY. REV. STAT. ANN. § 421.210(4) (Michie/Bobbs-Merrill 1972 & Supp. 1990); LA. REV. STAT. ANN. § 13:3734.1 (West 1991) (civil); *id.* §§ 15:477 to :478 (West 1981 & Supp. 1991) (criminal); ME. R. EVID. 505; MD. CTS. & JUD. PROC. CODE ANN. § 9-111 (1989); MASS. GEN. LAWS ANN. ch. 233, § 20A (West 1986 & Supp. 1991); MICH. STAT. ANN. § 27A.2156 (Callaghan 1986 & Supp. 1991); MINN. STAT. ANN. § 595.02(i)(c) (West 1988); MISS. CODE ANN. § 13-1-22 (Supp. 1991); MO. ANN. STAT. § 491.060(4) (Vernon 1952 & Supp. 1991); MONT. CODE ANN. § 26-1-804 (1989); NEB. REV. STAT. § 27-506 (1989); NEV. REV. STAT. ANN. § 49.255 (Michie 1986 & Supp. 1990); N.H. REV. STAT. ANN. § 516:35 (Supp. 1990) (clergy generally); *id.* § 330-A:16-c (1984 & Supp. 1990) (certified pastoral counselors); N.J. STAT. ANN. § 2A:84A-23 (West 1976); N.M. R. EVID. 11-506; N.Y. CIV. PRAC. L. & R. 4505 (McKinney 1963 & Supp. 1990); N.C. GEN. STAT. § 8-53.2 (1986 & Supp. 1990); N.D. R. EVID. 505; OHIO REV. CODE ANN. § 2317.02(C) (Anderson 1991); OKLA. STAT. ANN. tit. 12, § 2505 (West 1980 & Supp. 1991); OR. REV. STAT. § 40.260 (1989); 42 PA. CONS. STAT. ANN. § 5943 (1982 & Supp. 1991); R.I. GEN. LAWS § 9-17-23 (1985); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1985 & Supp. 1990); S.D. CODIFIED LAWS ANN. §§ 19-13-16 to -18 (1987); TENN. CODE ANN. § 24-1-206 (1980 & Supp. 1990); TEX. R. CIV. EVID. 505, TEX. R. CRIM. EVID. 505; UTAH CODE ANN. § 78-24-8(3) (1987 & Supp. 1990); VT. STAT. ANN. tit. 12, § 1607 (1973); VA. CODE ANN. § 8.01-400 (Michie 1984 & Supp. 1991); WASH. REV. CODE ANN. § 5.60.060(3) (West 1963 & Supp. 1991); W. VA. CODE § 57-3-9 (Supp. 1991); WIS. STAT. ANN. § 905.06 (West 1975); WYO. STAT. ANN. § 1-12-101(a)(ii) (Michie 1988 & Supp. 1991).

148. The form of these statutes varies. Some specify that clergy must report, ARIZ. REV. STAT. ANN. § 13-3620(A) (Supp. 1990); COLO. REV. STAT. § 19-3-304 (Supp. 1990); CONN. GEN. STAT. ANN. § 17a-101(b) (West Supp. 1991); LA. REV. STAT. ANN. § 14:403(B) (West 1986 & Supp. 1991); MISS. CODE ANN. § 43-21-353 (1981 & Supp. 1991); NEV. REV. STAT. ANN. § 432B.220 (Michie 1986 & Supp. 1990); N.H. REV. STAT. ANN. § 169-C:29 (1990 & Supp. 1990); N.D. CENT. CODE § 50-25.1-03 (1989 & Supp. 1991); UTAH CODE ANN. § 62A-4-503 (1989 & Supp. 1990); W. VA. CODE § 49-6A-2 (1986). Some imply that clergy must report, *e.g.*, 23 PA. CONS. STAT. ANN. § 6311a (Supp. 1991). Some include clergy by requiring *any person* to report, ALA. CODE § 26-14-3 (1986); DEL. CODE ANN. tit. 16, § 903 (1983); IDAHO CODE § 16-1619(a) (1979 & Supp. 1991); IND. CODE ANN. § 31-6-11-3 (Burns 1987 & Supp. 1990); NEB. REV. STAT. § 28-711 (1989); N.J. STAT. ANN. § 9:6-8.10 (West 1976 &

municant evidentiary privilege may conflict with a statutory requirement that clergy report suspected cases of child abuse.[149]

The clergy-communicant privilege has roots beyond the evidentiary, civil and criminal provisions in which it is currently embodied. Traditionally the privilege has been recognized in the Code of Canon Law,[150]

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Supp. 1991); N.M. STAT. ANN. § 32-1-15 (Michie 1989 & Supp. 1990); N.C. GEN. STAT. § 7A-543 (1990 & Supp. 1990); OKLA. STAT. ANN. tit. 21, § 846 (West 1983 & Supp. 1991); R.I. GEN. LAWS § 40-11-3 (1990); S.D. CODIFIED LAWS ANN. § 26-8A-4 (Supp. 1991) (requires "any person" to report only if death ensues); TENN. CODE ANN. § 37-1-403 (1984 & Supp. 1990); TEX. FAM. CODE ANN. § 34.01 (West 1986 & Supp. 1991); WYO. STAT. ANN. § 14-3-205 (Michie 1986 & Supp. 1991). Some abrogate the clergy privilege. ARIZ. REV. STAT. ANN. § 13-3620(G) (expressly abrogates clergy-communicant privilege as grounds for not reporting); DEL. CODE ANN. tit. 16, § 908 (1983) (abrogates all privileges except attorney-client as grounds to exclude evidence at child abuse proceedings); IDAHO CODE § 16-1620 (1979 & Supp. 1991) (expressly abrogates clergy privilege as grounds to exclude evidence at child abuse proceedings); NEV. REV. STAT. ANN. §§ 432B.250, .255 (Michie 1986) (abrogates all privileges for persons required to report and as grounds to exclude evidence); N.H. REV. STAT. ANN. § 169-C:32 (1990) (abrogates all privileges except attorney-client as grounds for failure to report); R.I. GEN. LAWS § 40-11-11 (1990) (abrogates all privileges except attorney-client as grounds for failure to report or testify in child abuse proceedings); TEX. FAM. CODE ANN. § 34.04 (West 1986 & Supp. 1991) (abrogates all privileges except attorney-client as grounds to exclude evidence in child abuse proceedings); W. VA. CODE § 49-6A-7 (1986) (abrogates all privileges except attorney-client in situations involving child abuse); WYO. STAT. § 14-3-210 (1986 & Supp. 1991) (abrogates all privileges except attorney-client and physician-patient as grounds to exclude evidence in child abuse proceedings).

149. Such a conflict arises when the state requires the reporting of child abuse, yet also grants a privilege of confidentiality. For example, Mississippi law requires "[a]ny . . . minister . . . or any other person having reasonable cause to suspect that a child . . . is a neglected child or an abused child . . . [to] cause an oral report to be made immediately." MISS. CODE ANN. § 43-21-353 (1981 & Supp. 1990). *Contra* MISS. CODE ANN. § 13-1-22 (Supp. 1990) (allowing clergy-communicant privilege). The Mississippi evidentiary privilege states in part:

> (2) A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a cler[ic] in his [or her] professional character as spiritual advisor.
>
> (3) The privilege may be claimed by the person, by his [or her] guardian or conservator, or by his [or her] personal representative if deceased. The cler[ic] shall claim the privilege on behalf of the person unless the privilege is waived.

*Id.*

Similar language is used in NEB. REV. STAT. § 28-711 (1989) (requiring any person to report), and *id.* § 27-506 (1989) (allowing clergy privilege); N.H. REV. STAT. ANN. §§ 169-C:29, :32 (1990) (requiring priests, ministers and rabbis to report and abrogating all privileges except attorney-client privilege), and *id.* § 516:35 (Supp. 1990) (respecting clergy privilege); N.J. STAT. ANN. § 9:6-8.10 (West 1976 & Supp. 1991) (requiring any person to report), and *id.* § 2A:84A-23 (West 1976 & Supp. 1991) (forbidding disclosure of confidential communications made to cleric); OKLA. STAT. ANN. tit. 21, § 846 (West 1983 & Supp. 1991) (mandating reports by every person having reason to believe child has been abused), and *id.* tit. 12, § 2505 (West 1980 & Supp. 1991) (respecting clergy privilege).

150. *See supra* notes 94-95 and accompanying text; *see generally* Marie Breitenbeck, *The Canonical Tradition of Confidentiality Pertaining to Oral Communications, in* CONFIDENTIALITY IN THE UNITED STATES: A LEGAL AND CANONICAL STUDY 93 (Canon Law Society of America 1988) (surveying tradition of confidentiality under Canon Law).

and these roots support the duty of clergy to maintain the confidentiality of communications made during religious practices despite the threat of criminal prosecution.

### *A. Historical Roots of the Privilege*

The clergy-communicant privilege originated with the Seal of Confession:[151] "The sacramental seal is inviolable; therefore, it is a crime for a confessor in any way to betray a penitent by word or in any other manner or for any reason."[152] The 1983 revised Code of Canon Law heightens the significance of the confidential nature of the confessional by using the phrase "it is a crime for a confessor to betray a penitent"[153] in contrast to the 1917 Code, which stated less stringently that the confessor was "carefully to guard against" betraying the penitent.[154] Regardless of the phrase used to express the seriousness of a priest's obligation of secrecy, the Code of Canon Law establishes that the Seal is all encompassing and contains no exceptions.[155] All matters that fall within the Seal of Confession are sacrosanct; those privy to its sanctity are consummately bound to secrecy.[156]

Canon 1388 addresses the seriousness of the secrecy obligation surrounding the Seal of Confession: "A confessor who directly violates the Seal of Confession incurs an automatic (latae sententiae) excommunication reserved to the Apostolic See; if he does so only indirectly, he is to be punished in accord with the seriousness of the offense."[157] Because of the seriousness and sanctity of the transaction taking place within the Seal of Confession, the breaking of the Seal has traditionally been one of the most severely penalized offenses within the Code.[158]

English law recognized the Seal of Confession from the time of the Norman Conquest in 1066 until the English Reformation in the sixteenth

151. *See* 1983 CODE c.1388, §§ 1-2; *id.* c.983, §§ 1-2; *id.* c.984, §§ 1-2. See *supra* note 94 for the full text of these canons.

152. 1983 CODE c.983, § 1.

153. *Id.*

154. 1917 CODE c.889, §§ 1-2.

155. *See* Breitenbeck, *supra* note 150, at 95.

156. See *supra* notes 94-95 for a discussion of the pertinent provisions in the Code of Canon Law.

157. 1983 CODE c.1388, § 1. The 1917 Code chapter 2368 suggested lesser penalties against the confessor who violated the Seal of Confession only indirectly such as suspension from celebrating the Eucharist or suspension or deprivation of the privilege of hearing confessions. *See* Breitenbeck, *supra* note 150, at 99.

158. *See* Thomas Green, *Title III: Usurpation of Ecclesiastical Functions and Offenses in Their Exercise (cc. 1378-1389)*, *in* THE CODE OF CANON LAW, *supra* note 53, at 924, 927 ("seriousness of the offense is clear from the fact that it is one of only five excommunications reserved to the Holy See").

century.[159] The sanctity of the confessional was not respected after the Reformation.[160] As a result of this break with tradition, the Seal of Confession was not an authority recognized by the founders of this country.[161] Thus, most American courts required that any privilege of confidentiality to protect priest-penitent communications be imposed by statute.[162] Oddly enough, in 1813 the first American case to recognize such a clergy privilege based the privilege not on common law or statutory grounds, but on constitutional grounds.[163]

A New York court in *People v. Philips*[164] recognized the clergy-communicant privilege for a Catholic priest.[165] Four years later, however, the privilege was not extended to a Protestant minister.[166] Thus began the denominational debate over the recognition of the privilege, the definition of "minister," and the legislative attempt to officiate.[167]

The clergy privilege appeared in federal common law as early as 1875,[168] and was reaffirmed in 1958 in *Mullen v. United States*.[169] In *Mullen*, the court not only recognized the clergy privilege, but also addressed the denominational and situational dilemma of when to apply the

159. *See* Mitchell, *supra* note 55, at 736.

160. *Id.* at 737.

161. *Id.*

162. *Id.*

163. See SAMPSON, *supra* note 4, for a participating attorney's report of the 1813 New York case of People v. Philips, N.Y. Ct. Gen. Sess. (1813).

164. N.Y. Ct. Gen. Sess. (1813).

165. McConnell, *supra* note 4, at 1411.

166. *See* People v. Smith, 2 Rogers NY City Hall Rec. 77, 80 (1817).

167. The New York legislature was the first to statutorily recognize the clergy privilege in 1828, and other states were soon to follow. *See* Mitchell, *supra* note 55, at 737.

168. *See* Totten v. United States, 92 U.S. 105, 107 (1875) (recognizing theory of clergy privilege in dicta).

169. 263 F.2d 275, 276 (D.C. Cir. 1958) (Fahy, J., concurring).

privilege.[170] Today, the privilege is embodied in federal common law[171] as well as in Rule 501 of the Federal Rules of Evidence.[172]

### *B. Clergy's Entitlement to Invoke the Privilege*

Clergy privilege statutes vary as to their focus. Some center on the individuals who can qualify under the definition of clergy, and others concentrate on what situations qualify as confidential communications.[173] Many problems of interpretation arise as a result of the definitions which set the boundaries for the scope of each statute. Similarly, case law addresses two main issues: (1) whether a given person, or class of people, qualifies to invoke the privilege;[174] and (2) whether the situation in which the privilege is invoked qualifies under the statute, regardless of the privilege claimant's status.[175]

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170. *Id.* at 276 (Fahy, J., concurring). Justice Fahy wrote in his concurrence:

> Was the disclosure of appellant to the minister a confidential confession to a spiritual advisor? The answer would be clearer were the relationship of priest and penitent involved, where the priest is known to be bound to silence by the discipline and laws of his church. . . . But I think the privilege if it exists includes a confession by a penitent to a minister in his capacity as such to obtain such spiritual aid as was sought and held out.

*Id.* at 277.

171. *See, e.g.*, Trammel v. United States, 445 U.S. 40, 45 (1980) (recognizing importance of priest-penitent privilege); United States v. Luther, 481 F.2d 429, 432 (9th Cir. 1973) (corporation not protected by priest-penitent privilege because not natural person); United States v. Wells, 446 F.2d 2, 4 (2d Cir. 1971) (holding letter to priest not within ambit of privilege because purpose was not to obtain religious or other counseling, advice, solace, absolution or ministration); *In re* Verplank, 329 F. Supp. 433, 435 (C.D. Cal. 1971) (holding draft counseling services performed by priest fell within scope of privilege); *In re* Contemporary Mission, Inc., 44 B.R. 940, 943 (Bankr. D. Conn. 1984) (holding priests employed by corporation not immune from testifying as to corporation's religious functions under federal rules).

172. FED. R. EVID. 501. Rule 501 states:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

*Id.* Congress opted for this broader and more flexible rule, rather than specifying instances of privileged communications, because it allows for an ad hoc development of the privilege. *See* Mitchell, *supra* note 55, at 739.

173. See *supra* note 147 for a compilation of clergy-communicant evidentiary privilege laws.

174. *See, e.g.*, Mullen v. United States, 263 F.2d 275, 277-80 (D.C. Cir. 1958) (Fahy, J., concurring); Eckmann v. Board of Educ., 106 F.R.D. 70 (E.D. Mo. 1985).

175. *See, e.g.*, People v. Edwards, 203 Cal. App. 3d 1358, 248 Cal. Rptr. 53 (1988), *cert. denied*, 489 U.S. 1027 (1989); People v. Thompson, 133 Cal. App. 3d 419, 184 Cal. Rptr. 72 (1982); Jones v. Department of Human Resources, 310 S.E.2d 753 (Ga. Ct. App. 1983).

As a general rule, communications to Catholic priests engaged in the practice of confession come within the protections of the clergy-communicant privilege.[176] However, a dilemma arises when the priest or other cleric is not acting wholly within the confines of "confession," yet the religious situation still requires confidentiality.

The Washington Supreme Court addressed this dilemma in *State v. Motherwell*.[177] In *Motherwell*, three religious counselors were convicted of violating the Washington reporting statute.[178] The three counselors claimed the clergy privilege in an evangelical Christian church.[179] The court addressed the issue of whether there was an implied exemption of clergy from the reporting requirement.[180] In doing so, the court held that "[s]imply establishing one's status as 'clergy' is not enough to trigger the exemption in all circumstances. One must also be functioning *in that capacity* for the exemption to apply."[181] Thus, religious counselors may claim the privilege as long as they are acting within the scope of their duty as clergy.[182] On appeal, the court upheld the convictions of two of the counselors who were not ordained ministers and did not report the child abuse in question.[183]

Arguably any clergy member who acts within the scope of a confidentiality duty, as defined by the particular denomination, whether in spiritual counseling or consolation, should be able to claim the privilege. However, one court did not extend this privilege to a Catholic nun because she did not perform priestly functions.[184] In contrast, the court in

176. *See* Donna Krier Ioppolo et al., *Civil Law and Confidentiality*, *in* CONFIDENTIALITY IN THE UNITED STATES, *supra* note 150, at 3, 8.

177. 788 P.2d 1066 (Wash. 1990). See *supra* notes 29-40 and accompanying text for a discussion of *Motherwell*.

178. *Motherwell*, 788 P.2d at 1067.

179. *Id.*

180. *Id.* at 1069. In *Motherwell*, the court noted that the statute in question was amended subsequent to the date of the offenses in the case. *Id.* at 1068 n.1. Thus the court's analysis made reference to the former statute. *Id.*

181. *Id.*

182. *See* Wainscott v. Commonwealth, 562 S.W.2d 628 (Ky.) (requiring clergy to act in professional capacity), *cert. denied*, 439 U.S. 868 (1978); State v. Hereford, 518 So. 2d 515 (La. Ct. App. 1987) (requiring clergy to act in professional capacity); Partridge v. Partridge, 199 S.W. 415 (Mo. 1909) (requiring professional capacity of clergy).

For a more complete discussion of the statutory definitions of terms such as "clerics" and "clergy" as they relate to organizational and denominational definitions, see Mitchell, *supra* note 55, at 742-46.

183. *Motherwell*, 788 P.2d at 1076; *see also* State v. Barber, 346 S.E.2d 441 (N.C. 1986) (refused to grant privilege to Sunday school teacher who was not ordained or licensed minister).

184. *See In re* Murtha, 279 A.2d 889 (N.J. Super. Ct. App. Div. 1971), *review denied*, 281 A.2d 278 (N.J. 1971).

*Eckmann v. Board of Education* [185] acquitted a Catholic nun because she did perform certain priestly functions, such as serving as a spiritual director.[186] Such cases, however, "entangle the state in the properly religious matter of defining a cleric's professional role or delimiting the cleric's ministry."[187]

In addition to the struggle to determine which religious roles meet the definitional requirements of the state statutes, courts also face a problem when determining the nature of the relationship between the clergy member and the "confider." This dilemma of which communications qualify under the privilege was addressed in *People v. Edwards*.[188] In *Edwards*, the court held that a communication made for the purpose of seeking counseling rather than absolution did not merit the protection of the privilege.[189] Other courts have applied this general rule.[190] Some have applied the privilege to communications made during marriage counseling,[191] even with both spouses present.[192] If both spouses participating in the communications with clergy have waived the privilege, the clergy member must testify.[193] Courts have also extended the privilege

185. 106 F.R.D. 70 (E.D. Mo. 1985).

186. *But see* Masquat v. Maguire, 638 P.2d 1105 (Okla. 1981) (leaving open question whether Catholic nun would qualify under state statute as "clergy" and therefore rightfully claim privilege).

187. Mitchell, *supra* note 55, at 744.

188. 203 Cal. App. 3d 1358, 248 Cal. Rptr. 53 (1988), *cert. denied*, 489 U.S. 1027 (1989).

189. *Id.* at 1363, 248 Cal. Rptr. at 56.

190. *See, e.g.*, People v. Thompson, 133 Cal. App. 3d 419, 184 Cal. Rptr. 72 (1982) (requiring purpose of receiving religious consolation); Jones v. Department of Human Resources, 310 S.E.2d 753 (Ga. Ct. App. 1983) (requiring purpose of receiving spiritual counseling); Farner v. Farner, 480 N.E.2d 251 (Ind. Ct. App. 1985) (allowing clergy to testify about non-religious situation); State v. Black, 291 N.W.2d 208 (Minn. 1980) (requiring purpose of seeking spiritual advice with expectation of confidentiality); State v. Jackson, 336 S.E.2d 437 (N.C. Ct. App. 1985) (allowing privilege as long as spiritual counsel is sought, even though cleric is relative), *review denied*, 341 S.E.2d 572 (N.C. 1986).

191. *See* Pardie v. Pardie, 158 N.W.2d 641 (Iowa 1968) (recognizing exception for family counseling by clergy); Kruglikov v. Kruglikov, 217 N.Y.S.2d 845 (Sup. Ct. 1961) (recognizing exception for marital counseling by clergy), *appeal dismissed*, 226 N.Y.S.2d 931 (App. Div. 1962); LeGore v. LeGore,.31 Pa. D. & C.2d 107 (1963) (recognizing exception for conversation with clergy regarding marital dispute); Rivers v. Rivers, 354 S.E.2d 784 (S.C. 1987) (recognizing exception for communications entrusted to cleric in his or her professional capacity). *But cf.* Ziske v. Luskin, 524 N.Y.S.2d 145 (Sup. Ct. 1987) (holding priest's records regarding marriage counseling not privileged when couple places damages regarding their relationship at issue at trial).

192. *See* Spencer v. Spencer, 301 S.E.2d 411 (N.C. Ct. App. 1983) (privilege applied to confidential communications to clergy during marital counseling).

193. *See* De'Udy v. De'Udy, 495 N.Y.S.2d 616 (Sup. Ct. 1985) (privilege unavailable to clergy if waived by communicant). Despite waiver of the privilege by the communicant, a cleric bound by the Seal of Confession would still not be permitted to testify or report under

to protect communications made during Catholic annulment proceedings.[194]

When a court rules on the nature of a communication, it must distinguish between what is privileged and what is not. Communications made to a clergy member *as a friend* are not privileged.[195] However, the communication may be classified as privileged if the requisite qualifications can be shown despite a friendship between the clergy member and communicant.[196] Similarly, a clergy member who fortuitously overhears a non-confessional communication would not be able to invoke the privilege since no spiritual counsel was sought.[197]

Regarding the communicant, most statutes apply the clergy privilege to *any person*, either expressly[198] or impliedly.[199] Some statutes, however, are very specific in defining who qualifies as a communicant for purposes of the privilege.[200]

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the Code of Canon Law. See *supra* notes 94-95, 151-58 and accompanying text for a discussion of the pertinent provisions in the Code of Canon Law.

194. *See* Cimijotti v. Paulsen, 219 F. Supp. 621 (N.D. Iowa 1963) (privilege applied to confidential communications made by penitent to clergy and also to statements made by non-penitent, to provide corroboration of penitent's statements as required by state law), *aff'd*, 340 F.2d 613 (8th Cir. 1965). The court reasoned that allowing elders of the church to hear otherwise privileged communications, when made according to church discipline, "is only giving cler[ics] the same benefit as is given to attorneys and physicians whereby they may consult with other attorneys or physicians about a client's problem without destroying the client's privilege." *Id.* at 624. Were such communications to occur strictly within the confines of the confessional, however, the cleric would not be permitted to divulge those communications, even to other clergy. See *supra* notes 94-95, 151-58 and accompanying text for a discussion of the pertinent provisions in the Code of Canon Law.

195. *See, e.g.*, Burger v. State, 231 S.E.2d 769 (Ga. 1977) (holding not privileged communication to cleric, who was also frequent companion, of intent to kill wife and her lover); Wainscott v. Commonwealth, 562 S.W.2d 628 (Ky.) (communication to cleric, as a friend, and not acting in professional capacity was not privileged), *cert. denied*, 439 U.S. 868 (1978).

196. *See, e.g.*, *Jackson*, 336 S.E.2d at 437 (communication to cleric who is relative may still be privileged).

197. *See, e.g.*, State v. Berry, 324 So. 2d 822 (La. 1975) (privilege did not apply to minister who heard communication because defendant did not come for spiritual direction), *cert. denied*, 425 U.S. 954 (1976).

198. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 5943 (1982 & Supp. 1991) ("No cler[ic], priest, rabbi or minister of the gospel . . . who while in the course of his [or her] duties has *acquired information from any person secretly and in confidence* shall be compelled, or allowed . . . to disclose that information. . . ." (emphasis added)).

199. *See, e.g.*, IND. CODE ANN. § 34-1-14-5 (Burns 1986 & Supp. 1990) (clerics considered incompetent witnesses "as to confessions or admissions made to them in course of discipline enjoined by their respective churches").

200. *See, e.g.*, CAL. EVID. CODE § 1031 (West 1966 & Supp. 1990) (defining "penitent" as "a person who has made a penitential communication to a [cleric]"); *id.* § 1032 (defining "penitential communication" as "a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a [cleric] who, in the course of the discipline or practice of his [or her] church, denomination or organization, is authorized or accustomed to

### C. Purpose of the Privilege

The Supreme Court has recognized the value of the clergy-communicant privilege by stating that "[t]he priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."[201] This recognition demonstrates the personal, as well as the social, need for confidentiality in religious conduct.

Other federal courts have subsequently noted the value of the privilege.[202] The Third Circuit acknowledged that "virtually every state has recognized some form of clergy-communicant privilege [which is] grounded in a policy of preventing disclosures that would tend to inhibit the development of confidential relationships that are socially desirable."[203] Once the conditions for invoking the privilege are met,[204] courts accept that the interest in maintaining confidentiality is more important than the court's need to be presented with all relevant evidence.[205]

In addition to the evidentiary purpose for the privilege, clergy-communicant confidentiality has both a secular and a sacred purpose.[206] Invoking the privilege in the case of confidential communications of abuse made during religious counseling or confession would assist future pro-

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hear such communications and, under the discipline or tenets of his [or her] church, denomination, or organization, has a duty to keep such communications secret.").

201. Trammel v. United States, 445 U.S. 40, 51 (1980).

202. *See, e.g., In re* Grand Jury Investigation, 918 F.2d 374, 381 (3d Cir. 1990); *In re* Verplank, 329 F. Supp. 433, 435 (C.D. Cal. 1971).

203. *Grand Jury Investigation*, 918 F.2d at 383.

204. Dean Wigmore spells out the conditions necessary to support a confidential communications privilege. 8 WIGMORE, *supra* note 13, § 2285 at 527. See *supra* note 13 for the criteria for invoking such privileges.

205. *See, e.g.*, Mullen v. United States, 263 F.2d 275, 280 (D.C. Cir. 1958) (Fahy, J., concurring). In *Mullen*, the concurring opinion elaborated on the policy reasons for upholding the privilege:

> Sound policy—reason and experience—concedes to religious liberty a rule of evidence that a clergyman shall not disclose on a trial the secrets of a penitent's confidential confession to him, at least absent the penitent's consent. Knowledge so acquired in the performance of a spiritual function . . . is not to be transformed into evidence to be given to the whole world. . . . *The benefit of preserving these confidences inviolate overbalances the possible benefit of permitting litigation to prosper at the expense of . . . the spiritual rehabilitation of a penitent.*

*Id.* (Fahy, J., concurring) (emphasis added).

206. *See* O'Brien, *supra* note 18, at 109. O'Brien suggests that the opportunity for the clergy to change the pattern of abuse manifested by the abuser and the ability to "retrieve [the abuser's] life" through reconciliation is a result of the "confidentiality of the confessional and the sanctity of the priest-penitent privilege." This effect is what differentiates the clergy privilege from other privileges and also offers a foundation for treatment. *See id.*

tection for abused children by promoting rehabilitation of the abuser.[207] In essence, confidentiality results in a lessening of child abuse,[208] whereas, reporting by clergy brings about prosecution of the abuser.[209] When the abuser is the child's parent, reporting would also impair efforts to maintain family integrity.[210] Thus, holding the clergy-communicant

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207. *See generally* O'Brien, *supra* note 18 (commenting on rehabilitative value of clergy privilege in case of pedophilia). While counseling is appropriate and beneficial within the confessional, the essence of the Sacrament of Penance is contrition on the part of the penitent and absolution on the part of the confessor. Counseling is most appropriate as a means of determining contrition and as a vehicle for absolution.

Clergy qualifications to provide counseling vary according to the religious denomination. For example, among strict Bible-oriented denominations, counseling is a gift of the Holy Spirit. 1 *Corinthians* 12:8 (New Am. Bible) ("To one is given through the Spirit the expression of wisdom; to another the expression of knowledge according to the same Spirit.") In contrast, the Roman Catholic Church has established lengthy course requirements in clinical pastoral education as prerequisites for ordination and ministerial counseling. *See* SYNOD OF BISHOPS, *LINEAMENTA*: THE FORMATION OF PRIESTS IN CIRCUMSTANCES OF THE PRESENT DAY (1989) ("Moral problems arising from the present-day world demand a theological explanation which integrates the human sciences . . . ."); SACRED CONGREGATION FOR CATHOLIC EDUCATION, THE BASIC PLAN FOR PRIESTLY FORMATION (1970) ("The study of psychology, pedagogy, and sociology are of great assistance in the acquisition of this fuller knowledge of people and their problems."). Methodist seminary training includes some family counseling, and Methodist clergy must be licensed by the state in order to provide marriage and family counseling. Telephone interview with Reverend Frederick Cook, Senior Minister, Westchester United Methodist Church, Westchester, Cal. (Aug. 30, 1991). Similarly, the Episcopalian clergy must meet state guidelines to be qualified as counselors. Telephone interview with Reverend Lynn Jay, Vicar, St. Stephens Episcopal Church, Valencia, Cal. (Sept. 4, 1991).

Nevertheless, the essence of confession is a spiritual reconciliation with God, and the ability of the cleric to direct a pedophile towards reconciliation with God through professional clinical treatment is the product of both the grace of the sacrament and the counseling skills of the confessor.

208. *See* O'Brien, *supra* note 18, at 110, 119. O'Brien points out, however, that the secular and sacred purposes underlying the privilege are valuable in its protective effect only when specific objectives are fostered and enforced. These include "penance, avoidance of the offense, participation in effective treatment, [and] a sincere desire not to commit the offense again." *Id.* By requiring reports from clergy, the government "undermin[es] the confidential relationship between confiders and clergy [and] defeat[s] one valuable, nongovernmental means of achieving the state's own goal of preventing and treating child abuse." Mitchell, *supra* note 55, at 811.

209. The societal benefits of maintaining the clergy privilege may become especially important as the Court reformulates an analysis to replace the compelling state interest test. For instance, the Court may look to whether a particular religious practice serves a societal benefit in order to determine whether it should be constitutionally protected. See *infra* notes 270-303 and accompanying text for a discussion of cases in which the Court has considered public policy benefits in its analysis of other constitutional guarantees.

210. *See generally* Peters et al., *supra* note 18. The authors suggest that "[i]ntrafamilial abuse is commonly, but wrongly, considered a less serious form of child abuse, with offenders unlikely to abuse other children." *Id.* at 650. Because of this, intrafamily abuse is considered a "family problem" and is often left to be handled by social services. *Id.* at 650-51. With this or any other article concerning child abuse, the essential issue must be the best interest of the

privilege inviolate serves both the interest of the claimant seeking rehabilitation and the interest of the state seeking to protect the child.[211]

## IV. THE CONSTITUTIONAL CONFLICT BETWEEN REPORTING STATUTES AND THE CLERGY-COMMUNICANT PRIVILEGE

### *A. Reporting Requirements for Clergy Fail to Accommodate the Free Exercise Right*

As a result of heightened public awareness of the widespread and devastating effects of child abuse, the electorate has tolerated the limits placed on testimonial privileges.[212] The conflict between the secular duty to report and the religious duty to maintain confidence should not be posed in such a way as to suggest that clergy should *always* have a privilege of silence.[213] Free exercise of religion does not categorically prohibit state action, rather, distinctions must be made on a case specific basis.[214] Nonetheless, the question remains whether the constitutional right to free exercise can be protected when a specifically religious act is confronted by mandatory reporting statutes.

Unlike *Maryland v. Craig*,[215] where the Supreme Court held that the Sixth Amendment right to confrontation was not absolute,[216] the

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child, which is often overlooked in favor of the rights or presumptions surrounding a parent in the context of family.

211. *See* O'Brien, *supra* note 18, at 117-28. This argument rests on the assumption that the privilege is, in fact, conducive to treatment and a cessation of abuse on the part of the confessor. O'Brien offers a descriptive analysis of how the privilege allows the clergy to meet these needs by recommending treatment. He discusses four modes of treatment for the pedophile: (1) psychotherapy, (2) behavior therapy, (3) surgery, and (4) medication. *Id.*

Society's interest is also served insofar as "treatment undertaken on the individual's own voluntary initiative is easier and better than treatment forced later on as a result of some social crisis." *Id.* at 119 (quoting D.J. West, *Adult Sexual Interest in Children: Implications for Social Control*, *in* SEXUAL INTEREST IN CHILDREN, PERSONALITY AND PSYCHOPATHY 252, 263 (1981)); *see also id.* at 110 n.78.

212. *See* Ioppolo et al., *supra* note 176, at 35. In some instances, however, legislatures have reconsidered the abrogation of the clergy-communicant privilege. For example, the Florida legislature reinstituted the privilege after John Mellish, a minister who refused to divulge information he obtained in the confession of a parishioner accused of molesting a young girl, was held in contempt of court and sentenced to 60 days in jail. *See* Mellish v. Florida, No. 84-1930 (Fla. Dist. Ct. App. dismissed Aug. 30, 1985).

213. *See* William A. Cole, *Religious Confidentiality and the Reporting of Child Abuse: A Statutory and Constitutional Analysis*, 21 COLUM. J.L. & SOC. PROBS. 1, 24-35 (1987). *But cf.* O'Brien, *supra* note 18, at 96 (suggesting that "reducing this painful and complicated predicament to such a simplistic conflict is superficial").

214. *In re* Grand Jury Investigation, 918 F.2d 374, 388 (3d Cir. 1990) (no hard and fast rules as to when free exercise exemptions are required).

215. 110 S. Ct. 3157 (1990).

216. *Id.* at 3166.

protection afforded by the First Amendment Free Exercise Clause cannot be otherwise assured or satisfied.[217] The state's interest in the protection of children from future abuse cannot be justified without reliable assurances that the constitutional protection of religious practice is guaranteed.

In *Craig*, the majority held that certain constitutional rights[218] may be dispensed with when "necessary to further an important public policy."[219] The defendant challenged the use of a state statutory procedure that allowed a judge to receive the testimony of an alleged child abuse victim by one-way closed circuit television.[220] The constitutional guarantee of a defendant's right to confront his or her accusers was ensured by the opportunity for cross-examination, and the ability of the judge, jury and defendant to view the witnesses' demeanor by video monitor.[221]

The *Craig* majority opinion provides for an alternative means to satisfy the Confrontation Clause's physical presence requirement.[222] The Court makes these accommodations narrowly because of existing public policy and the necessity of the case.[223] The Court determined that the "[s]tate's interest in the physical and psychological well-being of child abuse victims" is an important public policy, and therefore, may "outweigh . . . a defendant's right to face his or her accusers in court."[224] The majority ruled that the Maryland closed-circuit testimony statute accommodated the truth-seeking protections promoted by the Confrontation Clause.[225]

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217. *Id.* For example, a priest cannot keep silent as to *most* of a parishioner's confession and maintain the Seal of Confession inviolate. See *supra* notes 94-95, 151-58 and accompanying text for pertinent provisions in the Code of Canon Law.

218. *Craig* involved the Sixth Amendment right to confrontation. *Craig*, 110 S. Ct. at 3166.

219. *Id.*

220. *Id.* at 3160-61. This procedure could be invoked only if the trial court determined that the child's courtroom testimony would cause serious emotional distress such that the child would not be able to communicate. *Id.* at 3161; *see also* MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989 & Supp. 1991).

221. *See Craig*, 110 S. Ct. at 3161.

222. *Id.* at 3169.

223. *Id.* "The critical inquiry . . . is whether use of . . . [alternative protections to face-to-face confrontation] is necessary to further an important state interest." *Id.* at 3167. Justice O'Connor wrote for the majority that such alternatives are necessary to further state public policy, *id.*, whereas Justice Scalia wrote in dissent to say that such accommodation is not permitted under the Sixth Amendment. *Id.* at 3171-72 (Scalia, J., dissenting). Justice Scalia wrote: "I am persuaded . . . that the Maryland procedure is virtually constitutional. Since it is not, however, actually constitutional," any accommodation must fail. *Id.* at 3176 (Scalia, J., dissenting).

224. *Id.* at 3167.

225. *Id.* at 3166-67. The Court reasoned that the "central concern of the confrontation clause is to ensure reliability of the evidence against a criminal defendant by subjecting it to

In his dissent, Justice Scalia condemned this type of "interest balancing,"[226] and rejected any accommodation that eliminated the face-to-face confrontation right protected by the Sixth Amendment. He wrote:

> [T]he Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was "face-to-face" confrontation. . . . [T]hat the defendant should be confronted by the witnesses who appear at trial is not a preference "reflected" by the Confrontation Clause; it is a constitutional right unqualifiedly guaranteed.[227]

This same reasoning should be applied to the Free Exercise Clause. The First Amendment guarantees regarding religion deserve the same protection that Scalia called for in his dissent in *Craig* to maintain the Sixth Amendment right to confrontation. Just as the "unwillingness [of a witness to testify in the presence of a criminal defendant] cannot be a valid excuse under the Confrontation Clause, whose very object is to place the witness under the sometimes hostile glare of the defendant,"[228] the state's desire to halt child abuse cannot justify limitations on the Free Exercise Clause. The First Amendment Free Exercise Clause protects historical and well-documented religious acts, such as the Sacrament of Penance, even when the state seeks to use that act to protect its citizens.[229]

Furthermore, the absence of comparable alternative safeguards for the specific religious act protected by the Seal of Confession prevents the state from ensuring the free exercise guarantee while enforcing a reporting statute as applied to confidential religious communications made to

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rigorous testing" in the adversarial process. *Id.* at 3163. It stated that the purpose of the Sixth Amendment right to confrontation is served by the combined effect of several elements, namely physical presence, oath, cross-examination and observation of the witness' demeanor by the trier of fact. *Id.* The Court found that Maryland's statutory procedure preserved all elements of the confrontation right, with only the exception that the child witness could not see the defendant as the child testified. *Id.* at 3166. Thus, the Court held that the use of televised testimony did not impinge on the purpose of the Confrontation Clause. *Id.* at 3167.

226. *Craig*, 110 S. Ct. at 3176 (Scalia, J., dissenting). Justice Scalia, with whom Justices Brennan, Marshall and Stevens joined in dissent, wrote: "The purpose of enshrining [the Sixth Amendment's right to confrontation in criminal prosecution] . . . in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court." *Id.* at 3171 (Scalia, J., dissenting).

227. *Id.* at 3172-73 (Scalia, J., dissenting).

228. *Id.* at 3174 (Scalia, J., dissenting).

229. "[The state's interest in more convictions of guilty defendants] is not an unworthy interest, but it should not be dressed up as a humanitarian one." *Id.* at 3175 (Scalia, J., dissenting).

clergy. In reference to child abuse reporting statutes, the state cannot provide for the same degree of accommodation as it did in *Craig*.[230]

In addition, the public policy of protecting children supports an exemption for confidential religious communications under mandatory child abuse reporting statutes following a theory that the religious practice and the reporting statutes serve this same end.[231] Nevertheless, after *Employment Division, Department of Human Resources v. Smith*,[232] there can be no such accommodation because there is no longer case authority mandating a balancing of the intricacies of the religious practices.[233] Mandatory clergy reporting of communications made within a specific religious act that requires secrecy as an essential element voids the protection of the Free Exercise Clause without providing any more protection for the child.

### *B. Clergy Exemptions from Child Abuse Reporting Statutes and State Liability*

One possible argument for the state maintaining a reporting requirement for privileged communications to clerics[234] is based on an expansion of the argument derived from the holding in *DeShaney v. Winnebago County Department of Social Services*.[235] In *DeShaney*, the United States Supreme Court held that a Fourteenth Amendment right to liberty[236] is

230. For instance, in *Craig*, the trial court had made individualized findings that each of the child witnesses needed special protection. *See id.* at 3163. Furthermore, the Supreme Court stated "[t]he Confrontation Clause, [unlike the Free Exercise Clause], is generally satisfied when the defense is given a full and fair opportunity to probe and expose . . . testimonial infirmities such as forgetfulness, confusion, or evasion through cross examination, thereby calling . . . attention . . . [to] giving scant weight to the witnesses' testimony." *Id.* at 3164 (quoting Delaware v. Fensterer, 474 U.S. 15, 22 (1985) (*per curiam*)). In addition, *Craig*'s acknowledgement that the "admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial," *id.*, has no counterpart in the First Amendment's protections. There are other instances when Sixth Amendment rights must be interpreted in the context of the necessity of trial and the adversary process. *See id.* at 3166, 3169.

231. See *supra* notes 110-17, 206-09 and accompanying text for elaboration on this theory.

232. 110 S. Ct. 1595 (1990).

233. *Id.* at 1604. Justice Scalia refused to allow the courts to examine religious beliefs in order to determine the plausibility of a religious claim under the Free Exercise Clause. "[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice." *Id.* at 1606 n.5 (Scalia, J., dissenting).

234. *See generally* Lori DeMond, DeShaney's *Effect on Future "Poor Joshuas"—Whether a State Should be Liable Under the Fourteenth Amendment for Harm Inflicted by a Private Individual*, 1990 B.Y.U. L. REV. 685 (reliance by children on state statute for protection from physical abuse creates substantive entitlement that should not be "arbitrarily undermined").

235. 489 U.S. 189 (1989).

236. U.S. CONST. amend. XIV, § 1, which states in part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." *Id.*

not denied when the state fails to protect an individual from harm inflicted by a private citizen.[237] In order to successfully claim a Fourteenth Amendment violation, the claimant must first show that the state deprived him or her of a constitutional right.[238] If the state deprives the claimant of a constitutional right by its failure to provide protection, then the state is burdened with an affirmative duty to provide protection.[239]

A constitutional deprivation will only occur, however, when one of two criteria is met: (1) "The plaintiff [must be] denied the benefits of a particular state statute which entitles the plaintiff to a property or liberty interest protected by the Fourteenth Amendment; or (2) The state actively intervene[s] to some extent, and . . . withdr[aws] its aid."[240] In *DeShaney*, the Court failed to address the second criterion and left the statutory entitlement issue unresolved.[241] However, the dissent's reasoning[242] coupled with the premise held by Professor DeMond, who comments on the *DeShaney* case,[243] may support the argument that the state should be held liable for the deprivation of Fourteenth Amendment rights to liberty by allowing an exception for clergy from mandated reporting of child abuse.[244] The assertion would be that the child's entitle-

237. *DeShaney*, 489 U.S. at 195. A similar case was recently decided involving the Illinois Department of Children and Family Services' failure to make "reasonable efforts" to prevent or eliminate the need for removal of abused, neglected or dependent children from their homes or to make it possible for the children to return to their homes. Artist M. v. Johnson, 917 F.2d 980, 983 (7th Cir. 1990). In *Artist M.*, the Seventh Circuit affirmed the district court finding that such a failure was a violation of the 1980 Adoption Assistance and Child Welfare Act (AAA), which encourages greater efforts to find permanent homes for children by providing reimbursements to the states for foster care maintenance and adoption assistance payments. *Id.* at 989, 992; *see also* 42 U.S.C. §§ 620-628, 670-679(a) (1988).

238. *See* DeMond, *supra* note 234, at 699-700.

239. *Id.* at 700. *See generally* Caitlin E. Borgmann, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect* DeShaney?, 65 N.Y.U. L. REV. 1280 (1990) (arguing *DeShaney* inapplicable to battered women); Steven F. Huefner, *Affirmative Duties in the Public Schools After* DeShaney, 90 COLUM. L. REV. 1940 (1990) (arguing that public school systems are "custodial" and calling for extension of affirmative duties of *DeShaney* to public school systems); Laura Oren, DeShaney's *Unfinished Business: The Foster Child's Due Process Right to Safety*, 69 N.C. L. REV. 113 (1990) (arguing for extension of *DeShaney* to foster care system).

240. DeMond, *supra* note 234, at 700.

241. *DeShaney*, 489 U.S. at 195 & n.2.

242. *Id.* at 205 (Brennan, J., dissenting).

243. The Supreme Court in *DeShaney* declined to consider the statutory entitlement issue because the question had been raised for the first time in petitioner's brief to that court. A future case making this argument in a timely manner may succeed. DeMond, *supra* note 234, at 700-01 & n.89.

244. *See, e.g.*, LA. REV. STAT. ANN. § 14:403(B)(4)(b) (West 1986 & Supp. 1990).

> [W]hen a priest, rabbi, duly ordained minister, or Christian Science practitioner has acquired knowledge of abuse or neglect from a person during a confession or other sacred communication, he [or she] shall encourage that person to report but shall not

ment to state protection would be created by the state statute that requires reporting. If the state made a statutory allowance for the clergy to claim a privilege exception, the state would fail to protect the child from abuse, thereby depriving the child of a constitutional liberty interest guaranteed by the Fourteenth Amendment.[245] By enacting the statute, the state assumes an affirmative duty to protect the child by requiring reports of child abuse; if the clergy are exempt from such a reporting requirement, the state could be held liable.[246]

The response to this argument is the same as in the First Amendment analysis below:[247] because the privilege from mandatory reporting for clergy is conducive to protecting the child's interest,[248] the state would not make an affirmative denial—only an affirmative support—of any protected right by exempting clergy from a statutory duty to report. The privilege should therefore be respected on both grounds—first, as a means of protecting the best interest of the child, and second, as sustaining the First Amendment's guarantee of free exercise to religious observers in an objective religious context.

## V. THE FREE EXERCISE GUARANTEE: A DELICATE BALANCE OF INTERESTS

### *A. A False Conflict*

One commentator has made a First Amendment argument that the Free Exercise Clause requires an exemption for clerics from child abuse reporting statutes.[249] The Fourteenth Amendment applies the Free Ex-

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be a mandated reporter of that information given in the confession or sacred communication.

*Id.*

245. The plaintiff in *DeShaney* argued that every child in Wisconsin had a substantive due process right, guaranteed by the Constitution, to be free from physical abuse, whether it was defined as a "liberty interest" in such freedom or a "property interest" in the guarantee of safety. *DeShaney*, 489 U.S. at 195; *see* DeMond, *supra* note 234, at 701; *see also* Taylor v. Ledbetter, 818 F.2d 791, 794 (11th Cir. 1987) (advancing similar argument), *cert. denied*, 489 U.S. 1065 (1989).

246. The state involvement is self-evident and satisfies that requirement. *See* DeMond, *supra* note 234, at 701-02 (required "special relationship" that may be established outside confines of strict custodial status).

247. *See infra* notes 249-67 and accompanying text.

248. *See supra* notes 110-17, 206-09 and accompanying text; *see also* O'Brien, *supra* note 18, at 128.

249. *See generally* Kathryn Keegan, Comment, *The Clergy-Penitent Privilege and the Child Abuse Reporting Statute: Is the Secret Sacred?*, 19 J. MARSHALL L. REV. 1031 (1986) (supporting contention that mandating clergy reporting of child abuse violates tradition of free exercise).

ercise Clause to state governments.[250] In order to make a free exercise claim, one must show an infringement of his or her free exercise right.[251] Before the Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*,[252] once that showing was made the state had the burden of justifying the infringement by establishing that the law furthered a compelling interest.[253] Because the burden shifted to the state, the clergy did not have to show that the clergy-communicant privilege did, in fact, serve the state's interest.[254] After *Smith*, however, a religious claim must rest on its naked significance because the compelling state interest test is no longer available.

In *State v. Motherwell*,[255] the Washington Supreme Court held that the state's interest in protecting the welfare of children was sufficient to justify an infringement of the claimant's right to free exercise.[256] In making this determination, the court applied the analysis it used in *Witters v. Commission for the Blind*,[257] which held that the free exercise claimant must show "the coercive effect of the enactment as it operates against him in the practice of his religion."[258] In other words, the claimant must show that the action imposed by the state forces the claimant to act against the tenets of his or her religion.[259] In *Motherwell*, two of the

250. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

251. One commentator argues that although the clergy privilege may find support under a free exercise analysis, it presents complications under the Establishment Clause. To reconcile this conflict, the author suggests that the court, being in the best position to do so, should balance the danger of violating the Establishment Clause if the privilege is allowed against the danger of violating free exercise rights if the privilege is refused. *See generally* Jane E. Mayes, *Striking Down the Clergyman-Communicant Privilege Statutes: Let Free Exercise of Religion Govern*, 62 IND. L.J. 397 (1987) (arguing for integrity of privilege under particular circumstances). Such an analysis would only uphold the clergy-penitent privilege, since in balancing the interests not allowing testimony in certain situations would serve the interests of the state.

252. 110 S. Ct. 1595 (1990).

253. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 718 (1981).

254. *See* O'Brien, *supra* note 18, at 137.

255. 788 P.2d 1066 (Wash. 1990). For a brief factual description of the *Motherwell* case, see *supra* notes 29-40 and accompanying text.

256. *Motherwell*, 788 P.2d at 1072.

257. 771 P.2d 1119, 1123 (Wash.) (Witters II), *cert. denied*, 110 S. Ct. 147 (1989).

258. *Id.* (quoting School Dist. v. Schempp, 374 U.S. 203, 223 (1963)).

259. Witters v. Commission for the Blind, 689 P.2d 53, 57 (Wash. 1984) (Witters I), *rev'd on other grounds, sub nom.* Witters v. Washington Dep't of Servs., 474 U.S. 481 (1986) ("The challenged state action must somehow compel or pressure the individual to violate a tenet of his religious belief."). In the case of mandatory child abuse reporting laws, the statute would have the coercive effect of requiring any cleric, who would otherwise not be required to report a suspected case of child abuse, to violate the tenet of his or her religion that mandates confidentiality. The importance of this tenet is underscored in the Code of Canon Law. See *supra* notes 94-95, 151-58 and accompanying text for a discussion of the pertinent provisions in the Code of Canon Law.

claimants were religious counselors who contended that the reporting statute impaired their ability to counsel their parishioners.[260] The court, however, held that free exercise claimants must show not only that their religious practice is inhibited, but that adherence to the state's requirement makes it impossible for them to *observe* their religious tenets.[261]

The court distinguished the claimants in *Motherwell* based on their role as counselors.[262] The court noted, however, that requiring reporting in situations where the religious tenets mandate that all information in the counseling session be confidential may lead to a different result.[263] Clearly, the court implied a reference to the express code provisions for confessional secrecy or the severe ecclesiastical penalties such as those of the Roman Catholic Church.[264] Because the Code of Canon Law requires that communications within the Seal of Confession remain confidential, it appears to place the Catholic priest in opposition to the best interest of the child.

Notwithstanding the apparent conflict between the child's safety right and the clergy's free exercise claim, in certain situations it is in the best interest of the child, and therefore consistent with the state's interest, that knowledge of the particular incident of abuse or at least the particular abuser not be reported by clergy. Thus, even where reporting would not infringe on First Amendment rights, as the court held in *Motherwell*,[265] the state's interest in the welfare of the child may well be advanced by maintaining clergy-communicant confidentiality. In essence, the issue of serving the child's best interest, insofar as it relates to the reporting of child abuse by clergy, may not be rooted in the Free Exercise Clause conflict.[266] Entangling the child's interest with the

260. *Motherwell*, 788 P.2d at 1070-71.

261. *Id.* (citing Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (holding no coercion to violate religious beliefs simply by virtue of fact that state's act will impair, or even "virtually destroy," ability to practice one's religion)).

262. *Id.* at 1071 ("Requiring church counselors to report suspected child abuse does not prevent them from counseling their parishioners. Counseling can continue even after a report is made.").

263. *Id.* at 1071 n.8.

264. See *supra* notes 94-95, 151-58 and accompanying text for a discussion of the pertinent provisions in the Code of Canon Law.

265. 788 P.2d at 1072-73.

266. This assertion is consistent with Professor O'Brien's reasoning:

> Only when these objectives—penance, avoidance of the offense, participation in effective treatment, a sincere desire not to commit the offense again—are fostered and enforced, is there an effective answer to those who would abolish the privilege in light of the vast increase in child abuse. *An emphasis upon these objectives, rather than upon the constitutional basis in free exercise*, is a better approach to the state's actual or potential abrogation of the priest-penitent privilege; it responds to the public interest in lessening child abuse.

rights of religious practitioners seems illogical and inhibitive of the states' goals when, in defined situations, the interests of the two are concomitant.[267]

### C. *The Child's Best Interest Versus Freedom of Religion*

In *State v. Motherwell*,[268] the court cited a number of cases in other contexts in which the United States Supreme Court and the Washington Supreme Court have upheld state regulations that advance the state's interest in protecting children.[269] However, these cases are distinguishable because the claimants' interests were arguably diametrically opposed to the interests of the state and the welfare of the child. But these interests do not always conflict in situations requiring clergy to report child abuse. Thus, the application of a free exercise analysis is not always necessary, or appropriate, when maintaining confidentiality not only conforms to religious tenets, but also serves the secular purposes of preventing future abuse and healing the family so that the abused child can have the benefit of a normal family environment. Such cases occur when maintaining confidentiality serves to foster rehabilitation for the abuser and thereby serves the best interest of the child.

A case in point is *Maryland v. Craig*.[270] *Craig*, like *Motherwell*, weighed a governmental interest against a constitutional right. In *Craig*, the United States Supreme Court weighed the interest in protecting children from abuse against the Sixth Amendment guarantee of the right to confront one's accuser.[271] The Court held that a state's interest in the well-being of child abuse victims[272] may be sufficiently important, in

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O'Brien, *supra* note 18, at 110 (emphasis added).

267. This point becomes more obvious when considering the state's justification for infringing on the religious practice of confidentiality. In *Backlund v. Board of Commissioners*, the court held that a state regulation that infringed on religious practices would be justified by a "compelling governmental interest." 724 P.2d 981, 986 (Wash. 1986), *appeal dismissed*, 481 U.S. 1034 (1987). The state's interest in cases of confidentiality is obviously the protection of children, which is unquestionably compelling. To satisfy that interest, the state regulations must be "the least restrictive imposition on the *practice* of [the claimant's] belief." *Id.*

268. 788 P.2d 1066 (Wash. 1990).

269. *See id.* at 1072 (citing Jehovah's Witnesses v. King County Hosp., 390 U.S. 598 (1968) (involving parent's free exercise rights concerning blood transfusions for child), *aff'g* 278 F. Supp. 488 (W.D. Wash. 1967); Prince v. Massachusetts, 321 U.S. 158 (1944) (involving child labor laws); State v. Meacham, 612 P.2d 795 (Wash. 1980) (involving proof of paternity)).

270. 110 S. Ct. 3157 (1990).

271. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [or her].").

272. The majority opinion in *Craig* cites a line of cases holding that "a state's interest in 'the protection of minor victims of sex crimes from further trauma and embarrassment' is a 'compelling' one." *Craig*, 110 S. Ct. at 3167 (quoting Globe Newspaper Co. v. Superior Court, 475 U.S. 596, 607 (1982)).

some cases, to outweigh a defendant's right to face his or her accusers in court.[273]

In the majority opinion, Justice O'Connor stated that general rules of law which grant protections such as those offered by the Sixth Amendment, "however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case."[274] The constitutionally protected interest in confrontation may in fact "disserve" the Confrontation Clause's truth-seeking goal by causing significant emotional distress in the child and inhibiting the child's testimony.[275] Thus, the protected constitutional interest is outweighed when the state's interest can be more effectively attained by denying the protected interest.[276]

The *Craig* decision shows that the denial of one interest can actually serve another interest. This accommodation is possible under mandatory reporting statutes as well. Because required clergy reporting may actually disserve the state's interest in protecting children, and because the state's interest may be served more effectively by *not* requiring clergy to report under certain circumstances,[277] the First Amendment right to free exercise is not outweighed by any other interest and should therefore be protected. Such an analysis presents one possible response to the pending gauntlet to free exercise.

Specifically, within the context of the Seal of Confession, any effort on the part of the state to prosecute or provide civil penalties would violate the express wording of the Free Exercise Clause.[278] This argument, incorporating the historical significance of the First Amendment, Justice Scalia's fierce repudiation of Justice O'Connor's "virtual" approach to the Sixth Amendment in *Craig*,[279] and *Employment Division, Department*

273. In *Craig*, Sandra Ann Craig was charged with various sexual offenses committed against Brooke Etze, a six-year-old child who attended a pre-kindergarten school owned by Craig. *See id.* at 3160. The issue was whether use of a one-way closed circuit television camera during the child's testimony in lieu of testimony in open court was necessary to further an important state interest—in this case, the psychological well-being of the child. *Id.* at 3169.

274. *Id.* at 3165 (quoting Mattox v. United States, 156 U.S. 237, 243 (1895) (Confrontation Clause intended to prevent conviction by affidavit)).

275. *Id.* at 3169. The Court's rationale in *Craig* is that the Sixth Amendment's Confrontation Clause was designed to foster truth rather than hearsay. Thus, the primary goal is truth, not physical confrontation. *Id.* The Court stated that "face-to-face confrontation 'may so overwhelm the child as to prevent the possibility of effective testimony.' " *Id.* (quoting Coy v. Iowa, 487 U.S. 1012, 1032 (1988) (Blackmun, J., dissenting)).

276. *Id.* The Court stated that the state's interest will outweigh the constitutional interest only after the state shows why it is necessary to do so in a particular case.

277. *See supra* notes 110-17, 206-11 and accompanying text.

278. *See Craig*, 110 S. Ct. at 3176 (Scalia, J., dissenting).

279. *Id.* at 3171-76 (Scalia, J., dissenting); *see supra* notes 226-29 and accompanying text.

*of Human Resources v. Smith*'s[280] abandonment of the compelling state interest test,[281] requires the state to recognize historical religious practice and to substantiate statutory effectiveness.[282]

In the same way that the Court in *Craig* balanced the interests of the child against the Sixth Amendment, the Court balanced the child's interest against the Fifth Amendment privilege against self-incrimination[283] in *Baltimore City Department of Social Services v. Bouknight.*[284] In *Bouknight*, the Court held that a mother could not invoke the privilege against self-incrimination to resist a juvenile court order to produce a child suspected of being abused.[285] The child, Maurice M., was suspected of being abused by his mother.[286] A juvenile court order was obtained to remove Maurice from Bouknight's control.[287] Bouknight violated the order and was held in contempt.[288] Bouknight claimed that the order unconstitutionally compelled her to testify, through the production of the child in court, that she had continuing control over the boy under circumstances of abuse; circumstances for which she reasonably suspected she would be prosecuted.[289] The Court rejected this claim, reasoning that the interest in protecting the child falls within a "regulatory regime constructed to effectuate the state's public purposes unrelated to the enforcement of its criminal laws."[290]

Similarly, requiring clergy to report would fall under "a regulatory regime constructed to effectuate the state's public purpose" in protecting children, and therefore should be enforced. Although the reporting statutes may be related to the enforcement of criminal laws against child abuse,[291] *Bouknight* suggests that even when criminal conduct may exist,

280. 110 S. Ct. 1595 (1990).

281. *Id.* at 1602-06.

282. There is reasonable doubt that any statute directing clergy to report will bring about fewer instances of child abuse. See *supra* note 117 for a discussion of the Maryland law mandating reports of child abuse from psychotherapists.

283. *See* U.S. CONST. amend. V, which states in part: "No person . . . shall be compelled in any criminal case to be a witness against himself [or herself]."

284. 110 S. Ct. 900 (1990).

285. *Id.* at 903.

286. *See id.*

287. *Id.*

288. *Id.* at 904.

289. *Id.* at 905.

290. *Id.* This characterization was brought about by Bouknight's assumption of custodial duties. *Id.* at 905-07. "The state imposes and enforces that obligation as part of a broadly directed, non-criminal regulatory regime governing children cared for pursuant to custodial orders." *Id.* at 907. Similarly, the classes of persons required to report under the various reporting requirements are required to do so because of the "custodial" nature of their relationship with the child. *See supra* notes 123-27 and accompanying text.

291. *See Bouknight*, 110 S. Ct. at 912-13 (Marshall, J., dissenting).

a court may enforce its request "for reasons related entirely to the child's well-being."[292] Given the weighted interest in the child's well-being, a balance of interests should shift in favor of clergy not reporting in certain situations.[293] Since mandated reporting may even run counter to the state's public purpose,[294] the First Amendment interest in protecting confidentiality within religious practices should be protected when it is consistent with the state's interest.[295]

Finally, in *Osborne v. Ohio*,[296] the United States Supreme Court upheld a state statute that proscribed the possession and viewing of child pornography by putting the state's interest in protecting children above the "First Amendment interest in viewing and possessing child pornography" in the privacy of the home.[297] The Court found that the state's justification for the law—the protection of children—was unique and compelling, unlike other reasons submitted for state restrictions,[298] and therefore was sufficient to outweigh the First Amendment privacy inter-

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292. *Id.* at 908.

293. *See supra* notes 110-17, 206-11 and accompanying text. Throughout this argument, it is important to keep in mind that clergy silence is only justified under a free exercise claim when that silence is mandated by an objective religious practice. The mere fact of being a cleric does not automatically exempt a person from reporting in all circumstances.

294. *Id.*

295. After *Smith*, this results from the naked claim of the free exercise of religion, which is different from balancing interests under a compelling interest test. See *supra* notes 72-85 and accompanying text for a discussion of the holding in *Smith*.

296. 110 S. Ct. 1691 (1990).

297. *Id.* at 1695-97. In *Osborne*, the petitioner possessed four photographs in his home, depicting nude male adolescents in sexually explicit positions. *Id.* at 1695. The Court noted that child pornography has minimal First Amendment value, but still assumed the existence of a First Amendment interest in the private viewing and possessing of child pornography. *Id.* The Ohio statute prohibited any person from possessing or viewing any material or performance showing a minor who is not his child or ward in a state of nudity, unless (a) the material or performance is presented for a bona fide purpose by or to a person having a proper interest therein, or (b) the possessor knows that the minor's parents or guardian has consented in writing to such photographing or use of the minor. OHIO REV. CODE ANN. § 2907.323(A)(3) (Anderson Supp. 1990).

298. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (Wisconsin statute providing that residents who have not met court-ordered obligations for child support may not marry without court approval held to violate equal protection); Eisenstadt v. Baird, 405 U.S. 438 (1972) (Massachusetts statute making it a felony for anyone except those provided by statute to give away contraceptive devices found unconstitutional on equal protection grounds); Griswold v. Connecticut, 381 U.S. 479 (1965) (Connecticut statute forbidding use of contraceptives held unconstitutional because it violated marital privacy); *see also* Stanley v. Georgia, 394 U.S. 557 (1969) (striking down Georgia statute outlawing private possession of obscene material because it violated First Amendment right to receive information and ideas).

In *Osborne*, the Court held that "the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in *Stanley*." *Osborne*, 110 S. Ct. at 1695.

est.[299] The anti-pornography statute was construed to be narrow in scope[300] and justified in light of the state's interest in protecting children and the nature of the activity being regulated.[301]

In contrast, a child abuse reporting statute that abrogates confidentiality within an objective religious act is not on equal footing with an anti-pornography statute even though both may seek to protect children. The state will have a more difficult time establishing the effectiveness of a statute limiting confidentiality within a confessional than establishing the effectiveness of the anti-pornography statute. Nothing in pornography will serve the child's best interest, but a strong argument can be made that such an interest is served by clergy confidentiality.[302]

Given the Supreme Court's analyses in *Craig*, *Bouknight* and *Osborne*—that the child's best interest may invite the Court to weigh constitutional guarantees—and given the significance of confidentiality as a preventative and rehabilitative means to limit child abuse, the clergy privilege should be considered part of the arsenal to protect the child's best interest. This argument is important because it invites the state to consider the statutory protection of the privilege[303] and avoid constitutional litigation. The argument is also important because it suggests that statutory elimination of clergy confidentiality within specific situations is not the only way to provide for the best interest of a child. The child's best interest may actually be furthered by maintaining the privilege. Thus, there is a false conflict between the state's goal and the religious practice because both can work toward the same end.

In terms of the state's interest being advanced by the least restrictive means, as required by *Backlund v. Board of Commissioners*,[304] the *Motherwell* court implied that by requiring only reporting and not commissive preventative action, the state accomplishes its goal by the least

299. *Osborne*, 110 S. Ct. at 1695-97.

300. *Id.* at 1698-99.

301. *Id.* at 1695-97.

302. *See supra* notes 206-11 and accompanying text.

303. See *Peyote Use In Idaho Approved*, WASH. POST, Mar. 27, 1991, at A5, reporting that 23 states have passed legislation legalizing the religious use of peyote by members of the Native American Church. *Id.* In June 1991 the Oregon legislature enacted a bill that legalized peyote use by members of the Native American Church in the practice of their religion. Act approved June 24, 1991, ch. 329 (WL, OR-LEGIS) (amending OR. REV. STAT. § 475.922 (1989)). Recently the Idaho legislature enacted a law allowing Native Americans to legally transport peyote to reservations for religious ceremonies and health purposes. IDAHO CODE § 37-2732A (Supp. 1991); *see also Indians May Transport Peyote*, N.Y. TIMES, Mar. 31, 1991, at A12.

304. 724 P.2d 981, 986 (Wash. 1986). See *supra* note 267 for a discussion of the *Backlund* case.

intrusive means.[305] The inverse is actually true: the state accomplishes its goal by the least intrusive means by allowing commissive preventative action and not requiring reporting. In other words, the state can be non-intrusive by allowing clergy to participate in quelling the confessor's abusive habits through spiritual counseling without threatening the cleric with criminal prosecution. This does not suggest that allowing confidential spiritual counseling to take place would obviate criminal consequences for the alleged abuser. Presumably, any person acting in the role of confessor truly interested in seeing the child protected and the abuser treated would counsel the abuser properly, so as to initiate autonomous ceding to authority.[306]

### *D. A Changing Constitutional Standard*

The standard used in *Maryland v. Craig*[307] delicately balances the compelling interest of the state in protecting children against the constitutional right of the defendant to face his or her accusers in court.[308] This standard changes, however, when the government action involved—in this case, mandating clergy to report—substantially burdens a religious practice. In *Employment Division, Department of Human Resources v. Smith*,[309] the United States Supreme Court held that "Oregon [could], consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of [sacramental peyote]."[310] Referring to the prohibition against peyote use, the Court stated that it would be a violation of the Free Exercise Clause if the state sought to ban the performance of or abstention from religious acts solely.[311] If the law is not specifically directed at religious practice, and it is constitutional when applied to those who commit the act for

305. *See Motherwell*, 788 P.2d at 1073. *But cf.* Cole, *supra* note 213, at 46-50 (broad requirements of many child protection statutes excessively burden free exercise of religion and fail "least restrictive means" test when applied to clergy).

306. For example, within the specific confines of the confessional, the confessor could refuse absolution of past offenses unless the abuser participated in professional and supervised counseling. Within the Roman Catholic Church, absolution can be so conditioned. *See* CODE OF CANON LAW, *supra* note 53, at 689-90.

307. 110 S. Ct. 3157 (1990).

308. *See id.* at 3166-67.

309. 110 S. Ct. 1595 (1990). In *Smith*, two men were fired from their jobs at a private drug rehabilitation program because of their use of peyote, which is a hallucinogenic drug, in a sacramental ceremony of their Native American Church. *Id.* at 1597. Subsequently, their unemployment benefits were denied by the state of Oregon pursuant to a state statute which disqualified employees who were released from their jobs due to "misconduct." *Id.* at 1598. The two men claimed that such a denial violated their right to free exercise of religion. *Id.*

310. *Id.* at 1606.

311. *Id.* at 1599.

nonreligious reasons, then the Free Exercise Clause does not relieve an individual of the obligation to comply with the law.[312] The Court takes this position even where the law happens to forbid or require the performance of an act that a religious belief requires or forbids.[313]

The *Smith* Court held that governmental actions "that substantially burden a religious practice" cannot be evaluated using the "compelling government interest" test.[314] The Court would not apply the compelling state interest test even when the conduct prohibited is "central" to the individual's religion.[315] The Court then described the variety of cases that would arise if a compelling state interest analysis were used for constitutionally required religious exemptions from civic obligations.[316] These cases are distinguishable from the case of exempting clergy from child abuse reporting statutes because the governmental interest in protecting children and the religious interest in confidentiality are likely to be proponents of the same end.[317] The Supreme Court relied on this societal benefit argument in *Craig*.[318] If the state legislatures accept the notion that not reporting confidential religious communications would actually further the state's interest in protecting children from further abuse, it would not be necessary to balance the confidentiality and child protection interests in the free exercise arena.

Once this argument has been accepted, the issue changes. The focus shifts from free exercise protections to legislative drafting, and the question becomes: where should state legislatures draw the line in reporting

312. *See id.* at 1599-1600.

313. *See id.*

314. *See id.* at 1604. The Court noted:

> The "compelling government interest" requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment . . . is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields . . . are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly.

*Id.* The Court pointed out that in this context no governmental action has ever been invalidated using the compelling interest test except for unemployment compensation. *Id.* at 1602. However, even if that test were applied beyond that narrow field, it could not be applied to exemptions from a generally applicable criminal law. *See id.* at 1603. "The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" *Id.* (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

315. *See id.* at 1604.

316. *Id.* at 1605-06. Justice O'Connor referred to this part of the majority opinion as "the parade of horribles." *Id.* at 1612-13 (O'Connor, J., concurring).

317. See *supra* notes 110-17, 206-11 and accompanying text for a discussion of how confidentiality rules and child abuse reporting statutes accomplish the same goal.

318. *See supra* notes 215-30 and accompanying text.

statutes to best promote the state's interest in protecting children by allowing clergy members not to report? Regardless of the standard applied, courts are denying free exercise claims when the argument in support of confidentiality does not demand a constitutional analysis.[319] Restrictions on the right to claim the clergy-communicant privilege to protect the confidentiality of confessions and religious counseling should not even enter the free exercise domain.

### *E. A Workable Solution*

The states' interests, whether or not described as compelling in relation to the clergy, religious or private interests, point toward one goal: the protection of children.[320] In pursuit of this goal, states can and should implement requirements for reporting suspected cases of child abuse by those in positions most likely to know about them. Those who do not have a bona fide reason for withholding such information should be required to comply. States should thus mandate reporting from everyone, exempting those who by not reporting would advance the state's interest in protecting children.[321]

In order to fully advance its objective of protecting children, the state should consider whether the objective of protecting children would be further advanced by exempting any classes of persons from the requirement of reporting.[322] Specifically, the state should exempt clergy from the reporting requirement when the information is received within the confines of the Seal of Confession because of its historical and objective character. In addition, those who qualify as clergy for purposes of claiming the privilege should be limited to those who administer spiritual counseling.[323] Any communication made outside of that scope, such as

319. A free exercise analysis should not be applied if the state accepts the notion that not reporting these confidential communications actually furthers the state's interest in protecting children where the clergy-communicant relationship promotes self-reporting and confidential counseling to prevent further child abuse. The Court in *Craig*, 110 S. Ct. at 3167, accepted such a societal benefit argument.

320. See *supra* notes 110-17 and accompanying text for a discussion of the purposes of child abuse reporting statutes.

321. Of course, the state can and should provide for permissive reporting from "all persons." *See supra* note 109 and accompanying text.

322. For example, many states exempt the attorney-client relationship in order to promote a just solution in civil and criminal disputes. *See, e.g.*, DEL. CODE ANN. tit. 16, § 908 (1983 & Supp. 1990); N.H. REV. STAT. ANN. § 169-C:32 (1990); R.I. GEN. LAWS § 40-11-11 (1990); TEX. FAM. CODE ANN. § 34.04 (West 1986 & Supp. 1991); W. VA. CODE § 49-6A-7 (1986); WYO. STAT. ANN. § 14.3-210 (Michie 1986 & Supp. 1991).

323. *See, e.g.*, State v. Motherwell, 788 P.2d 1066 (1990); *see also supra* notes 29-40 and accompanying text. One defendant's conviction was reversed because the statute was held to exempt those "licensed or ordained" within a religious denomination when they were counsel-

communications made to a friend or communications not intended as confidential, are not made for the purpose of protecting the child and therefore should be reported. Any communication made within the sphere of counseling performed by lay persons or other figures not directly related to the religious function of spiritual consolation would not fall within the clergy-communicant privilege.[324]

Simply taking the abuser out of the specific abusive situation does not achieve the state's purpose.[325] The state's purpose is only achieved when there is some indication that abuse will cease in the future. If allowing the privilege is consistent with that effort, it should be respected. Statutory exemptions for clergy should be viewed as alternatives to the gauntlet of protracted constitutional litigation tossed before the Free Exercise Clause by the Supreme Court's abandonment of the compelling state interest test.

## VI. CONCLUSION

Child abuse is one of the most upsetting crimes. Any measures taken by the state to prevent this crime would certainly garner wide acceptance and support. Legislative efforts to enlarge the scope of child abuse reporting statutes to include clergy are intended to further such a goal. Because some of these statutes mandate reporting in all contexts—without resort to common law privilege, evidentiary exclusion or statutory exemptions for clergy which are firmly rooted in historical foundations—they invite a conflict between the First Amendment free exercise exception and the best interests of children.

The United States Supreme Court faced the conflict between a religious practice and a generally applicable statute in *Employment Division, Department of Human Resources v. Smith*,[326] and rejected the compelling state interest test. After *Smith*, child abuse reporting statutes that include clergy must confront religious exercise in a balancing of interests.[327] The resulting jurisprudence limits judicial power to protect and

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ing in their role as clergy. Of course, among religious denominations with objective codes and traditions such as the Roman Catholic Church spiritual counseling will have specific connotations. State statutes should avoid Establishment Clause problems and forcing the courts to inquire into religious beliefs by careful drafting.

324. Admittedly, such persons may advance an argument that non-reporting would further the best interests of the child. Such an argument would not be supported by free exercise considerations.

325. *See generally* O'Brien, *supra* note 18 (analyzing the problem of pedophilia among clergy).

326. 110 S. Ct. 1595 (1990).

327. *Id.* at 1604.

advance the best interest of the child by allowing for free exercise exceptions to child abuse reporting statutes. Thus, courts applying the reasoning of *Smith* necessarily force minority religious practices and practitioners through a legal gauntlet that is directly opposed to the First Amendment's historical foundations and, more importantly, directly opposed to the interests of abused children.

Cases such as *Maryland v. Craig*[328] have recently concluded that when balancing the interests of the child against various constitutional guarantees, the balance will tip in favor of accommodating the interests of the child.[329] The state, however, does not have a monopoly on the interest in protecting children, nor does the state hold the only means of achieving that interest. While mandatory reporting requirements instituted by each state are one means of preventing child abuse, the First Amendment should not be "accommodated" to satisfy that which the state cannot prove is exclusively beneficial or effective. A religious exemption from a statutory requirement to report child abuse would at first appear to be in conflict with the state's goal in that such an exemption would limit reports of abuse and subsequent investigations. Insight into the purpose and effect of certain confidential religious communications shows evidence to the contrary. Because the privilege protecting the communications would also advance the child's interests by promoting rehabilitation of the abusive situation, the right to free exercise should prevail over a broad state objective in such a balancing test.

In light of the great weight given by the courts to the particular state interest of protecting children, restrictions on the means to advance that interest should be minimal. If any limits are imposed, they should advance other weighty interests or further advance the interest in protecting children. Particularized clergy exemptions from mandatory reporting requirements would do both. As long as those very sacred and unique circumstances provide another means of eliminating or deterring future abuse, the state should be open to allowing narrow, carefully considered restrictions on the all-inclusive requirement to report child abuse.

328. 110 S. Ct. 3157 (1990).

329. *Id.* at 3167; *see also* Baltimore City Dep't of Social Servs. v. Bouknight, 110 S. Ct. 900 (1990); Osborne v. Ohio, 110 S. Ct. 1691 (1990). See *supra* notes 270-303 and accompanying text for a discussion of these cases.